



## FOURTEEN ENGLISH JUDGES



THE RT. HON. THE EARL OF BIRKENHEAD  
LORD HIGH CHANCELLOR 1919-1922

From the portrait by Glyn W. Philpott, R.A., in Gray's Inn Hall

*By PERMISSION*

# FOURTEEN ENGLISH JUDGES

By  
The Right Hon.  
THE EARL OF BIRKENHEAD  
P.C., D.L., D.C.L., LL.D.

*His Majesty's Secretary of State for India,  
Lord Rector of Glasgow University,  
High Steward of Oxford University,  
Honorary Fellow of Wadham and Merton Colleges.*

*With Fifteen Half-tone Plates*



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To My Wife

B.



## PREFACE

THE biographical and critical sketches of Judges which are contained in this volume have already appeared in the *Empire Review* with the exception of the studies of Mr. Justice Fitzjames Stephen and of Lord Halsbury. My thanks are due to Commander Oliver Locker Lampson, D.S.O., M.P., for his permission to produce them in the form of a book.

I have not attempted to collect those Fourteen Judges whom I consider the greatest in our long list of illustrious lawyers. I could hardly, had this been my purpose, have excluded Chief Justice Cockburn; but certain considerations which I think would have attracted the biographical zest of Campbell repelled me a little from the task of reconstructing the career of this very remarkable man. The attempt, however, would be of interest, and I may one day undertake it. For if the public attention to judicial biography, as attempted by me, affords encouragement, and my leisure allows, it is not improbable that I may continue this series in a companion volume to be known as "More English Judges."

I have often thought, too, that an interesting volume—I mean, of course, a volume interesting to lawyers—could be written of Law Officers who have, so to speak, fallen out by the way through ill-health or political misadventure without reaching the judicial goal. A very

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arresting book, not lacking in dramatic quality, is suggested by this topic.

I may, perhaps, be allowed to say a word as to the method which I have proposed to myself in these studies. I have tried, in the first place, to set forth a simple biographical statement of the principal facts in the life of each Judge. I have tried, in the second place, to paint some kind of general picture of the man's personality so that the reader may know in general outline what kind of human being he was; and, in the third place, I have been at some pains to attempt a technical valuation of each individual subject as an artificer in the Law. The research required in this branch of the subject has been very great; and it would not have been possible for me to undertake it if I had not received the assistance of Mr. Roland Burrows, one of the most learned members of the English Bar. He has sifted and examined hundreds, perhaps thousands, of cases in the Year Books and in the Law Reports in order to bring before me those upon which he thought it likely that I might desire to comment, or which I might find it proper to collate.

My method, then, differs *toto cælo* from that of Campbell. His technical valuations—on the rare occasions when he attempts them—possess little or no value. I am egotistic enough to believe that mine are, on the whole, just. But, of course, my book neither possesses nor has attempted the racy readableness of Campbell's. This very self-satisfied man was frankly malicious. I suppose it may be considered more tempting to be malicious about your contemporaries and rivals than about characters who have

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passed into history and whom you never knew. I at least am free from any animosity; in life my work is nowhere scandalous; and I have not spared labour in the attempt to discover what kind of a man, and what kind of a Judge I was attempting, long after death, to reproduce.

The question is often asked, who was the greatest of all our English Judges; indeed, one or two newspaper critics of my articles have invited me to set out a list in the order of their greatness of the Judges whom I most admired. This task would be rather like that of suggesting the strongest cricket side which could be formed, if you were allowed a selection from all the cricketers who have ever played that game in Great Britain or in Australia.

Still, the attempt would not be without its fascination. But I have already made it plain that I have not included in this volume the fourteen Judges whom I study merely in obedience to a strict appraisalment of judicial quality. If and when I find leisure to complete my work, I will, in its preface, for the benefit of anyone who attaches the slightest importance to my opinion, attempt to make plain who, and in what order, are in my judgment the ten greatest Judges who have interpreted Law in the Courts of this country.

BIRKENHEAD.

*Charlton, 1925.*



# Fourteen English Judges

## FRANCIS BACON

EARL OF VERULAM

THE reputation of Bacon rests upon his philosophical works. His forensic and judicial career is remembered mainly because of his spectacular fall from power. At Gray's Inn his memory has always been kept green because of the work he did and the affection he had for the Inn ; but for others, both as lawyer and as judge, he has been completely eclipsed by the fame of his great rival, Sir Edward Coke. Yet no account of his career can possibly be complete which does not take into account his legal work. He was early called to the Bar ; he was always keenly interested in the welfare and advancement of the Inn, and as a politician he came to depend for place upon his call to the Bar. However great his reputation as a philosopher, his real ambition was to wield power as the servant of the Crown ; and it so befell that he could only attain that ambition through a legal career. The mean and pitiful devices to which he resorted and the humiliations to which he submitted in his desire to obtain office are evidence of that aspect of his character which led to his being described very unfairly as the "meanest" as well as the greatest and wisest of mankind.

When that is said, he conquered greatness by his power of thought and language, and, even in the law, where he was surpassed by a few, his achievements exceeded those of many who have been regarded in their day as supreme men of mark ; his failure is comparative only, and because he himself set so great a standard by which he may be judged.



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At his birth, all promised well. He came into the world on 25th January, 1561, the son of the Lord Keeper and nephew by marriage of the Great Lord Burghley.

England's High Chancellor, the destined heir  
E'en in his cradle of his father's chair ;  
Whose even threads the Fates spin round and full,  
Out of their choicest and their whitest wool.

His early life was that of a young man of position and promise. He entered Trinity College, Cambridge, in 1573, at the early age which was then customary, and in 1576 he became a student at Gray's Inn, of which the men of his family, for generations before and after him, were wont to become members. He advanced rapidly in the Inn, for by November in the year of his admission he was promoted to the Ancients' table, that is, he dined with the senior members of the Bar who were not Benchers, though he was not called until 27th June, 1583. In the meantime he had been for some years in France attached to the Embassy of Sir Amias Paulet. Early in 1579, however, he suffered his first blow. His father died, leaving but little money, and Bacon for many years suffered pecuniary embarrassment. He had some hopes of obtaining preferment through Lord Burghley, but they did not bear fruit. He did not elect to practise at the Bar, and for the next ten years he was in Parliament. In the 1584 Parliament he was elected for Melcombe Regis, and sat successively for Taunton, Liverpool, Middlesex and Southampton. There was in his day no regular party system, and the relations between the Executive and Legislature were not at all well defined. Nevertheless, members did, in fact, undertake the charge of Government business. Bacon soon made his mark and was frequently employed on Committees. Quite early in his career he took the opportunity of recording his views on political problems, the earliest expression, in 1584, being a "Letter of Advice on the Political

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Situation," remarkable alike for its maturity of outlook and for its advocacy of toleration. He pointed out the danger of driving loyal Roman Catholics to despair by forcing them to take an oath which no sincere Catholic could ever accept, and he further criticized the anti-Puritan activities of the Bishops. He was during this same period rising in the Inn. In 1586 he was invited to the Reader's table, although he did not become Reader until 1588, and he filled the office a second time in 1600. By 1591 he had become a great friend of the Earl of Essex and sought to advance under his patronage. He advised the Earl upon political matters, and his prospects were of the brightest, when his Parliamentary activities excited Elizabeth's displeasure, and consequently he never succeeded in obtaining employment under her. Nowadays he would not have been prejudiced; but for long years after his day a politician might fatally compromise his chances by actions which should have been regarded as perfectly legitimate and regular. The cause was an incident which arose upon a suggestion made by the House of Lords in 1594 that increased taxation should be granted. Bacon led the opposition in the House of Commons, not so much because he objected to the increase as that the action of the Lords might infringe the privileges of the Lower House. Unfortunately for him, the Lords were acting under Royal suggestion. The Attorney Generalship became vacant and the Queen declined to consider Bacon. The fact that he had never held a brief no doubt contributed, but Essex was in such favour that Bacon would doubtless have succeeded, even against Coke, who was appointed, if he had not incurred the Queen's displeasure. He soon removed the objection that he had not practised. In 1594 he was engaged in a great case on the Statute of Uses known as Chudleigh's case. Coke had argued it for the defendant, and on the second argument Bacon was briefed and won great commendation.

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Having missed the Attorney Generalship, Bacon endeavoured to be appointed Solicitor General, but in vain. To soften the blow, Essex presented him with a small estate in Middlesex. In 1596 the same patron suggested Bacon for the Mastership of the Rolls, but for some reason or other he never applied. Soon afterwards Essex fell into temporary disgrace, and Bacon wrote him a long letter of advice, full of sound reason and good sense but disfigured also by recommendation of flattery and by petty hypocrisies, which he himself was too prone to use to recommend his own cause. In January, 1597, he published his celebrated *Essays*, and thus laid the foundation of his real claim to fame. Nevertheless, he was still poor, and in 1598 suffered for a short time (how few know it) the indignity of imprisonment for debt.

When Essex went to Ireland as Lord Lieutenant, Bacon advised him. It is doubtful what line Bacon adopted, or what caused him to abandon the Earl when he fell. It is, indeed, possible that he only did so on learning of Essex's proceedings in Ireland, for Bacon's political beliefs were based upon the strong executive of a united nation, and the treason alleged against Essex struck at the heart of that conception. Nevertheless, most men would have excused themselves from appearing as counsel for the prosecution on a capital charge against a former patron and friend, and Bacon, by so appearing, has lain under severe condemnation ever since. It was obvious that, whatever his motives, he was advancing himself at the cost of a dear and loyal friend.

The accession of James led to a renewal of his hopes of office, but he was not immediately successful. He was made a King's Counsel—indeed, he is accused of causing the creation of the office in order to obtain precedence over his seniors at the Bar—and he was also knighted. Bacon endeavoured to further the King's designs, but his failure to manage the Commons prevented his attaining

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any real influence in matters of State. He was treated as, or drifted into the position of, an instrument ; indeed, his desire of office and pliability of mind were fatal to independence, for which quality James had no use. The constitutional position was undefined. Not only had the ideas of the Middle Ages become obsolete so that the theory and practice of the Constitution required revision by practical and far-seeing statesmen, but the character of the King and his adoption of the theocratic notion of the kingly position prevented that understanding which had enabled the practical, though masterful, Tudors to gloss over the inconsistency between an arbitrary executive and a constitutional legislature. Moreover, the Crown was now vested in the King of another country, and new relations with Scotland required negotiation. Bacon supported the Monarchy as the true constitutional authority, though he was alive to the danger threatened by the want of sympathy between Crown and Commons, accentuated as it was by the disappearance of the Tudor prestige. He took in hand the management of the proposal to unite England and Scotland. The Commons insisted first of all that some constitutional grievances should be redressed. Bacon could not reconcile the opposing views (the task, indeed, was impossible), and the union was postponed for a century. He was, however, one of the Commissioners for settling the conditions of the Union under a single Monarch, and in 1604 was confirmed in his office of King's Counsel with a salary of £60 a year.

In 1605 appeared his great work *The Advancement of Learning*, which gained him a European reputation. He retained none the less his itch for a purely English advancement.

In 1606 Coke became Chief Justice of the Common Pleas, and Bacon, who married during the year, was again disappointed, and even when he suggested that he should be given the Solicitor Generalship, which could, he thought,

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be made vacant by providing for the holder otherwise, he failed in his purpose. He was, however, much employed on the various disputes which began to multiply as to the jurisdiction of the Courts. James had a great idea of his judicial powers and was with difficulty persuaded not to sit in person. His views on kingly authority naturally influenced him to favour Chancery as against the Common Law Courts, whose rules were fixed and rigid, and Bacon was of no great use to him. Thus, in 1606, Bacon prepared a dissertation upon the differences which had arisen as to the jurisdiction of the King's Bench in counties where a royal authority known as the Council of the Marches exercised judicial as well as administrative functions. By 1607 Bacon had become Solicitor General, but this office did not prevent his continuing his literary pursuits. In 1608 he composed *Commentarius Solutus*, a series of private memoranda published after his death which do not reveal his character in the most amiable light. He also wrote a *Discourse upon the Plantations in Ireland*, a matter which was then greatly exercising the Administration. In 1610 he published a treatise entitled *De Sapientia Veterum* and wrote a celebrated opinion upon Sutton's Hospital.

In 1612 Salisbury, who was Bacon's cousin, died, and the latter avenged himself for the slight put upon him, as he thought, by Salisbury's excluding him from influence, by composing an *Essay on Deformity*, which he included in the later editions of his *Essays*. He also endeavoured to push his political ambitions now that Salisbury was out of the way ; but James was too addicted to the society of unworthy favourites to raise Bacon to a position of supreme importance, the more so as he was in the habit of toadying to these favourites. His professional career continued to flourish, and in October, 1613, he became at last Attorney General. His appointment proved that he had not lost the regard of his fellow members, for, though the Commons resolved that no Attorney General should sit in their

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House, a special exception was made in Bacon's favour. As Bacon rose, so Coke declined. It was on the former's suggestion that the Chief Justice was removed from the Common Pleas to the King's Bench, a position of greater dignity but less remuneration. The reason was that the King's Bench was less likely to bring Coke into conflict with the King's wishes in legal matters. Soon an actual quarrel broke out between the two men. Proceedings for High Treason were instituted against Peachum, a Somersetshire clergyman, and the Crown desired to consult the judges, which was then a usual practice. Coke had views on this function of the Courts which, if pushed to the logical conclusion, would have tended to set up the Courts as an independent arbitrator between Crown and subject as much out of Court as in legal proceedings. Such was the force of character as well as the learning and ability of the Chief Justice that the consultation of the Court as a body, which was the accustomed procedure, merely meant that Coke gave his opinion and the other judges assented. To prevent this, Bacon advised that the judges should be consulted separately, and dishonourably attempted to assist his scheme by procuring the spreading of a false rumour of the judges' opinions. Coke naturally was furious.

In 1616 Bacon led for the prosecution at the trial of the King's former favourite, Robert Carr, Earl of Somerset, who was convicted. The King granted a pardon, but Carr never regained his favour. During this year, while a fresh dispute was being waged with Coke, Bacon was promised the Great Seal ; but Lord Ellesmere, the Lord Chancellor, recovered. The dispute was whether the King could oust the jurisdiction of the Common Law Courts by issuing a writ to them not to proceed with the case without express permission from the King. Bacon attended with the writ which was called *De non procedendo rege inconsulto*. The Court was extremely angry, and long

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arguments were delivered. Bacon himself delivered what Coke described as "a famous argument" summing up the precedents. The fact was that in times past the writ was used to stay actions to which the Crown was not a party where the Crown's interests were involved, and it was desired that the King should be joined, so that his counsel could appear to safeguard the King. Coke himself, as Queen Elizabeth's Attorney General, had used the writ and justified it on that ground. What was wrong was to extend the application to cases where the Crown's pecuniary or proprietary interests were not concerned, for this was, of course, a serious interference with the Court and a denial of justice to litigants.

The next move was Coke's. He procured the preferment of two indictments against persons who had brought suits in Chancery after actions had been decided in the Common Law Courts. There were on the Statute Books certain Acts, known as the Statutes of Praemunire, aimed at the Papal Courts and imposing penalties on those who interfered with the King's Courts. The grand jury ignored the bills. Bacon, as Law Officer, advised that the Court of King's Bench could not interfere with the Court of Chancery. Before the dispute was settled a fresh dispute arose. Counsel, in a case before the Exchequer Chamber, had, during his argument, denied the existence of a particular prerogative. The Court was ordered at once to abandon the case, but, led by Coke, declined to do so. The result was that the Chief Justice was dismissed—a false move, for he placed without delay his vast learning at the disposal of the opposition to the King in the Commons.

While this controversy was raging, Bacon was sworn of the Privy Council, but continued as Attorney General. This was without precedent for over a century, but it meant that Bacon could no longer accept private briefs. It might have been a very serious loss to him had he not on the 7th March, 1617, been appointed Lord Keeper. He

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undertook his work with such energy that in three months he had cleared off the arrears in his Court. The Lord Kceper had the same functions as, but less dignity than, the Lord Chancellor. Each was the Keeper of the Great Seal, and the two offices could not be filled at the same time. In 1618 Bacon became Lord Chancellor and was raised to the Peerage as Lord Verulam.

Shortly before he had become Lord Keeper, Bacon had composed *The New Atlantis*, and in 1620 he published his great work entitled *Novum Organum*.

On 27th January, 1621, on the eve of the new session of Parliament, he was advanced a step in the pccrage, becoming Viscount St. Albans. It was clear that trouble was brewing, for Coke was now in Parliament and so, too, was Cranfield, the Master of Wards, who resented Bacon's treatment of him. A conflict between King and Commons was inevitable, and Bacon as the King's Chancellor could not hope to escape criticism. His fall was, nevertheless, sudden and unexpected. The attack upon him was opened on 14th March, 1621, by a complaint that the Chancery was shielding insolvents against their creditors. 'This charge was a mere opening move which, even if successful, could not be more than an annoyance. But a man named Christopher Aubrey unexpectedly petitioned the Commons, alleging that the Lord Chancellor had accepted bribes, and a second petitioner at once appeared. Bacon was not generally disliked in the Commons, who were content to forward the petitions to the Lords for inquiry. This was done on 17th March, 1621. Bacon was quite confident that he could repel the charges, but, once the allegation had been made, other accusations were brought forward which he could not meet. He was prostrated and begged for time to answer the charges, and at last took refuge in a general submission which was neither an admission nor a denial. The Lords required him to answer or admit the specific charges, and he was forced to reply admitting his



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guilt. On 1st May, 1621, the Great Seal was taken from him, and on the next day but one the Lords sentenced him to the usual savage penalty of the time—a fine of £40,000, perpetual disqualification for office, and imprisonment during the King's pleasure. As usual, also, the sentence was never fully carried out. His imprisonment lasted but a few days, and before the end of the year the sentence was remitted, excepting the disqualification, the removal of which he never succeeded in obtaining, in spite of, or indeed perhaps in part because of, his continual importunities.

After his fall, Bacon retired to Gray's Inn, and devoted himself to its affairs and his literary work. In 1623 he brought out the Latin edition of his *Advancement of Learning* under the title *De Augmentis Scientiarum*, and suggested to James that he should prepare a digest of the laws of England, a project which had always attracted him, but, though he twice formulated schemes for simplifying the laws, he never completed the work. In the same year he was disappointed by failure to obtain the Provostship of Eton.

In 1625 Charles I came to the throne. Bacon at once renewed his requests for a full pardon and for employment. It was not probable that a young autocrat like Charles, or his favourite Buckingham, would see fit to favour a request which would burden them with the importunities of a discredited old man, and he failed to gain favour. Next year he died, a victim to his scientific curiosity. It occurred to him that snow might be a preservative, and while investigating this idea at Highgate he caught a chill, from which he died at the age of sixty-five.

I turn now more particularly to Bacon's career as a lawyer. At first he elected not to practise. Many reasons no doubt contributed to his decision. He had been brought up among those who held both place and power, and his vaulting ambition probably shirked the descent to the ordinary work of a legal practitioner. A man of commanding

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and acknowledged intellect may well have shrunk from submitting with deference to the views of mental inferiors on the Bench. Nor was the practice of the law then an established road to political eminence. His bent, in practical affairs, was for administration and management ; in the world of thought, for abstract philosophy. He was the son of the Lord Keeper, the nephew of Lord Burghley, and his social position and inclinations led him first to diplomacy. But his father died, and Bacon found that he was poor. The easiest course was to rely upon influence, and his lifelong curse was the belief that influence was the mainspring of success. He could without difficulty enter Parliament, and so the ambitious young man became an agent of Government in the Lower House. Influence and employment in unpaid work did not relieve the anxieties of straitened means. No doubt, he realized that he was a useful instrument, but he desired to use, not be, the instrument. Gradually, therefore, he came to realize that a man of small means could, through the lucrative legal offices, attain that financial independence which alone could enable him to climb to power. The influence of Essex was his lever to attain the Attorney Generalship in 1594. Coke was preferred, and of the two reasons against Bacon, the disfavour of the Queen, and the fact that he had never practised, no doubt the latter was put to him most forcibly as a cause for his being passed over. The fact that, though he did not succeed, he was nearly preferred to Coke contributed no doubt largely to the lifelong antipathy between them.

There was a more profound cleavage. Coke, steeped in legal knowledge, could not conceive that any principle could surpass the rule of law. Bacon, the philosopher, was not so learned a lawyer ; but his grasp of philosophic principle enabled him with infinitely less labour to attain a command of law which though formidable was not so secure as Coke's immense mastery of details and subtleties.

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To Bacon the authority of the King was the guiding principle of State ; and, in that age, when an arbitrary Executive and an omnipotent Legislature were becoming aware that one or other must prevail, a man of Bacon's opinions was a menace to liberty. The anomalies of existing legal practice ; the insistence upon technical rules where expediency and convenience called for their disregard, and the claim to judicial independence were to him obstacles to efficient administration and incompatible with his ideas of government. He did not realize the danger of unrestrained authority when exercised by an unworthy monarch. It is not surprising. The settled ideas and habits of the Middle Ages were being slowly and painfully adapted to the new conditions which were in process of development. The material world had expanded, economic and social life had become transformed, and the whole world of thought was being remade. A new conception of resistance to authority was beginning to cause the gravest anxiety alike to administrators and to philosophers. As yet, no new workable theory of government had been tested by experience, and there was a failure to realize the rights and liberties of races, nations or individuals. The world was undergoing a new birth, mental, moral and social, which could not be accomplished until many years of strife and misery had been numbered.

The formalism of Coke was in essence necessary to civil liberty. The principles of Bacon, the man of affairs, afforded no obstacle to absolutism. His power as a philosopher perhaps caused him to be a failure as a statesman, for the thinker influences future thought more powerfully than he can hope to impress contemporaries. Besides, Bacon had no strong personal moral principles to guide his practice in the affairs of life, and without them a man cannot hope for the whole-hearted co-operation and esteem of his fellows.

In 1594, therefore, Bacon turned to the law as a career,

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and, to confound the critics, he appeared in his first cause to argue a technical point of English law on the same side as Coke. At first blush, it would seem temerarious, but Bacon's was a calculated boldness. The subject matter—the Statute of Uses—was one which had often been the subject of judicial decision, and the actual case had already been fully argued. Bacon had a long experience in Parliament, and, by his association with his fellow members at Gray's Inn, an acquaintance with contemporary legal thought. He was not a raw novice, and to such a man the case afforded the looked-for opportunity and the result justified his confidence.

Perhaps he was thereby encouraged to seek the Solicitor Generalship, for he could now claim to have proved his forensic skill, and his failure to obtain the office must have been an even more bitter disappointment than his earlier failure, for it showed that he was still in such disfavour that he could not hope for office. Probably it was a desire to regain favour at all costs that led him to appear against his former patron, Essex, where his interventions at the trial brought upon him the rebukes of his former friend. Certainly his appearance confirmed the soundness of a principle that a man should not appear as counsel in any cause where he has taken part in the circumstances in issue in the dispute.

There is one other case in Elizabeth's reign in which Bacon appeared, or at least someone of that name, for many members of his family practised at the Bar. The argument was on the question what facts would constitute reasonable and probable cause as a defence to an action for malicious prosecution. Bacon was for the unsuccessful plaintiff. The points were taken in a workmanlike way, but the case itself calls for no special mention (*Chambers v. Taylor, Cro. Eliz.*). He attended the Courts on other occasions, for, in Godbolt at p. 158, he is reported, when Solicitor General, to have referred to a decision in 40 Eliz. which justified

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an argument against the current and erroneous opinion of lawyers.

When James I ascended the throne, Bacon's hopes rose. He offered his services and they were accepted, but he did not attain office. Knighthood and precedence as King's Counsel did not compensate for the more material rewards that he coveted. But he set himself both in Parliament and in the Courts to further James' intentions. One object the King specially favoured was the legislative union of England and Scotland. Bacon undertook to manage the Commons, and it is curious to find that a speech of his in connection with proposed legislation is printed in a law report. James desired a declaratory Act that all persons born in Scotland after his accession were by the common law English subjects. He had issued a proclamation that such was the law, and the House of Lords agreed, and so, too, did the judges when consulted. The Commons were more independent, and the dispute between the Houses led to a conference between them, and Bacon was chosen to introduce the representatives of the Commons. It was obviously a delicate task, as he was managing the Government affairs in the House, and therefore had to retain his influence there, but he also had to keep the King's favour. His speech is a model of dexterous ingenuity, which could not be bettered by any of the great politicians who have arisen since his time. (Moore K.B. 790.)

There can be no doubt that he was of the same opinion as the King upon the point. He appeared for the successful plaintiff in the action where the question was finally and conclusively decided in favour of the official view. (*Calvin's Case* (1606), 7 Rep. 1.) Coke takes credit that the judges were not subjected to any influence, but as they had, most of them, expressed a favourable view, it is perhaps conceivable that the King did not think it necessary to bring about a foregone conclusion. In 1608 Bacon, then Solicitor General was one of the Crown Counsel on a claim, by the

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Bishop of Salisbury, that the office of Chancellor of the Order of the Garter appertained to his bishopric. The claim had been referred to the two Chief Justices and the Chief Baron, who reported against the claim.

He was also actively engaged in the disputes which arose as to the limits of the jurisdiction of the various Courts. At that time each Court was separate and distinct from the others, and, though the Common Law Courts had arrived at an understanding, the judges were extremely jealous of other Courts. It was established that they had a supervisory jurisdiction over inferior Courts, but there was a great deal of friction as to the Ecclesiastical Courts, which could obtain powerful assistance in fact if not in law from the Court of High Commission ; and the other anomalous Courts, such as the Court of the Marches, were so apt for the King's purposes that any supervision over them was resisted. The Court of Star Chamber does not seem to have been involved. That and the Court of High Commission succumbed to later Parliamentary attack, but the Court of Chancery was drawn into the disputes. It is commonly held that Coke's combativeness was the cause of these disputes ; but the Common Law Judges all held similar opinions. Coke was the personification of a Common Law Judge, but he was supported by his colleagues until their independence was threatened by the King ; for judges then held office only during the King's pleasure.

In 1609 one of the disputes with the Ecclesiastical Courts came to a head. The point was whether a plea, in an action for tithes in kind, that by custom or prescription a composition (called a *modus*) only was payable, was triable in the Ecclesiastical Court in which the actions were brought. The Common Law Courts claimed that any issue, whether there was a custom or prescription, was for them alone. James decided to hear and decide the dispute with his Council. The judges were summoned, and first the counsel for the clergy were heard. Bacon was assigned

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as their second counsel, and Coke gives a bare summary of his argument, saying contemptuously that he said rather less than had been said before. The judges were invited to argue on the other side, but objected that, though accustomed to give their opinion when consulted, they had never, in a matter which turned on what the law actually was, been asked to argue against men who, like Bacon, were daily appearing before them : not that they were afraid, but it was not seemly. They were ordered to proceed, and did so, with the result that James gave no real decision, for he was content to say that the clergy had not satisfied him, and to admonish all parties to keep within the limits of their jurisdiction. (*The Case de modo decimandi*, 13 Rep. 37.)

In 1612 Bacon was counsel in a number of cases, including the *Countess of Shrewsbury's Case*. He also wrote a celebrated opinion upon *Sutton's Hospital*, the points of which concerned the creation of corporations and the law of charities, and he was engaged as counsel in the case (10 Rep. 23a). In 1614 a case arose upon a *quo warranto*, and during the hearing Bacon, as Attorney General, confessed judgment on the King's behalf. Yelverton, the Solicitor General, was counsel and was faced by a refusal of the Court to give judgment. Coke said that a confession on fact would be listened to, but the Court would not be bound by his view of the law. Bacon appeared on a later date and told this Court "no King's Attorney had so been used for these five hundred years," and he "will not be so used again," and further that he had entered a *nolle prosequi*. The Court had to submit to that, but announced an intention to pronounce judgment. In spite of further efforts the defendant could not get judgment, and ultimately gave up the attempt. (*The King v. Briggs*, 2 Buls. 295.)

In 1615 Bacon was counsel for the King in the *Case of the Merchant Adventurers* (Calthrop). Edward III had granted a charter giving a monopoly in dealing in cloth which was exported undyed. James granted a charter

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to a new company to deal in cloth which was intended to be dyed in England. As the old company refused to surrender its charter, proceedings were taken to have it declared null, and Bacon, when applying for a speedy trial, outlined his case, which turned wholly on economic considerations. He said that the uncertainty pending trial prevented trade, which was the life-blood of the nation. His case was that the introduction of the dyeing industry would give employment here "whereby there should be a cure to the lazy leprosie which now overspreadeth our commonwealth." It would, he argued, increase the profits of English industry, strengthen our shipping, and further prevent the discredit brought on to English cloth by the malpractices of the Flemish dyers; and as the patent of Edward III prevented the project being carried out it was contrary to law and should be declared void. A speedy trial was ordered, but in the meantime the old company surrendered its charter to give the project a trial. It was a dismal failure, so the King revoked the new charter and reincorporated the old companies with added powers; and, says Calthrop, "the old company . . . do now trade again as formerly they did to the great content of the subject and benefit of the King and country."

In the same year Bacon prosecuted Sir John Hollis and two others in the Star Chamber for contempt of court. The murder of Sir Thomas Overbury had been a great scandal and there was grave reason to believe that the real offenders had been screened. Hollis and the others had been guilty of criticisms of the administration of justice. Bacon commenced by fulsome flattery of James, then proceeded to denounce murder by poisoning, and thirdly to praise the Judiciary, and especially Coke, "whose name . . . I cannot pass by, and yet I cannot skill to flatter. But this I will say of him, and I would say as much to ages, if I should write a story, that never a man's person and his place were better met in business than my Lord Coke



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and my Lord Chief Justice in the cause of Overbury." After a very lengthy introduction he stated shortly and clearly the nature of the offences. At the close of the hearing, "my Lord Coke" delivered judgment for the Court in a speech which amounted to another speech for the prosecution, and the usual extravagant penalties were imposed. Sir John Hollis complimented Bacon, for he said "Mr. Attorney had so well apply'd his charge against him that, though he carry'd the seal of a good conscience with him, he would almost make him believe he was guilty." (*Sir John Hollis and others*, 1 Harg. S.T. 334.) The scandal was not scotched, and next year the Countess of Somerset was tried by the Lords for the murder. Bacon led for the prosecution. She pleaded guilty and Bacon stated the facts, expressing pity for the lady and her husband and saying that no peer had been executed in that reign. He explained the earlier trials and executions, and also the delay in the present case, partly because of the prisoner's childbirth, and partly of the orders of the King which he read. Coke added that the other offenders had confessed. Lady Somerset spoke so low that she could not be heard, and Bacon obligingly repeated her appeal for mercy for her. The next day the Earl of Somerset was tried. Bacon did not make the opening speech but was in charge of the prosecution, which, like the previous one, was conducted with unusual courtesy to the prisoner. He did not sum up, as was customary. Both prisoners were reprieved, but never taken back into favour, and they died in obscurity. Thus ended a scandal which at one time threatened to involve the Throne in disgrace. (*Countess of Somerset's Case*, 1 Harg. St. Tr. 347; *Earl of Somerset's Case*, 1 Harg. St. Tr. 351.) To this period also belongs Bacon's "famous argument" on the writ *De non procedendo rege inconsulto*, which extorted Coke's reluctant approval.

It was in 1616 that Coke became involved in his dispute with the Court of Chancery. Bacon's opinion is extant

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and sets out with a wealth of learning and argument the reasons why the King's Bench was not exempt from orders in Chancery. The dispute has long since been settled. Law and equity are now fused, but at the time it may readily be imagined how amazed a lawyer like Coke must have been when the Chancellor forbade, under pain of imprisonment, a successful party to a common law action to take advantage of his judgment. Coke had been losing favour and now was on the brink of ruin. Bacon took a leading part against him, with the Great Seal as the reward of success. He did one unpardonable thing. Someone questioned Coke's Reports, and twenty-eight objections were drawn up but afterwards were reduced to five, and Coke was subjected to cross-examination by Bacon and others as to the accuracy of these Reports. Modern research has revealed many errors and imperfections, but to cross-examine a man upon his private works as a means of bringing humiliation upon him was unheard of; and the contemptuous references to the incident in contemporary accounts show that Bacon was not regarded as of sufficient legal eminence to be able to take part in the inquiry with any seemliness.

These cases show that Bacon was a competent lawyer, but that he was not one of those who live for posterity as consummate advocates. He lent himself to furthering the King's desires, but in that he shares the reproach with many others who had perhaps less excuse, including Coke himself.

From 1617 to 1621 Bacon was Lord Keeper and Lord Chancellor. Contemporary reports of the Chancery are merely a catalogue of cases where the Court would intervene. It is impossible to form a competent opinion upon his work in building up our system of equity, which indeed was not really erected into a consistent body of rules until the Restoration. One case is, however, reported at length in Calthrop's collection of cases relating to the City of

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London, but unfortunately judgment had not been given when the report was made. The facts were that Burrell, having a house with an ancient rent of £5 a year, let it to a man at that rent with a premium made payable yearly at £25 a year. Tithe was paid on the £5. The parson claimed tithe on £30 a year, but the Lord Mayor ruled against him, and therefore he exhibited a bill in Chancery alleging fraud and covin. The defendants justified that £5 was the ancient rent. It was argued twice before Bacon, and afterwards several times before a special Commission of which he was a member, but without result. There were six points :—1. Whether by the common law tithes can be demanded for houses. 2. If not, can custom create such a right? 3. What was the ancient payment and how it arose. 4 and 5. Whether the £25 a year was a rent. 6. What was the Court for tithes in the City. Calthrop, in dealing with the arguments, clearly indicates his own views. The probability is that Calthrop was preserving the arguments for the parishioners which he thought were sound.

In 1618 Bacon was present at the hearing of *Sir Baptist Hick's Case*, (Pop. 139 ; Hob. 215), when the Star Chamber held that libels contained in a letter to the person defamed were punishable, after the Court of King's Bench had held that publication to a third party was necessary for the common law remedy. This is the historical reason for libel in a letter to the person defamed being a criminal offence, though no action for damages will lie.

In the same year he was again present to hear a charge against Sir John Bingley, who held what would now be a command in the Navy, based on the fact that James I having given £200 to Captain Baugh and other pirates to make them loyal subjects, Bingley had used his position to defraud them of the greater part of the money, "whereby some died miserably and others became pirates again." He protested his innocence, and the result is not stated.

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Apparently, he was employed afterwards. Baugh and his associates were persons who still endeavoured to follow the example of Drake and the other Elizabethans, and, as James desired to be on friendly terms with Spain, their inopportune exploits were a nuisance.

In this year proceedings were taken against one Wrennum or Wrenham in the Star Chamber by Yelverton, the Attorney General, for traducing Bacon as Lord Chancellor. The defendant had been unsuccessful in a Chancery action and petitioned the King, alleging that "for his (Bacon's) unjust decree, he (W), his wife and children were murdered and by the worst kind of death by starving, and that now he (Bacon), having done unjustly, he must maintain it by speaking untruths, and that he must use his authority, wit, art and eloquence for the better maintenance thereof" with other scandalous words. Popham (p. 135) says that defendant was fined £1,000, ordered to be put on a horse, facing the tail, and ride from Fleet to Westminster with a paper stating his offence fastened on him, and there stand in the pillory and have one ear cut off, and then to be taken in like manner to Cheapside and there to be pillorized and to lose his other ear and to be imprisoned. Hobart (p. 220) merely says that Wrenham was fined £1,000.

*Riman v. Bickley*, (Pop. 129) was a curious Star Chamber case. Riman was the father-in-law of one defendant. The complaint was that the daughter-in-law had offered 40s. if anyone would horsewhip her husband; that one, Goulding, had accepted the offer but failed; and that when the husband lay dying she would not succour him. The cause of the trouble was that the husband was a drunkard who beat and ill-used her and was jealous of the man who had since married her. Bacon and Coke were members of the Court, which fined Mrs. Bickley £500, and said her second husband ought to pay it, because he had been too familiar with her. Bacon's reason was that it was

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a great misdemeanour in the wife "to do so to her husband, as they used to do to children or fools, to wit to give them the whip, and so to disgrace and take away the good name of her husband, which, viz., a man's good name and his children's are the two things which make a man live to posterity." Coke added that if the husband had died (of the whipping) it would have been a capital offence in the wife. Somehow, the wife's woes appeared to have been forgotten. In 1619 Bacon is recorded as being, by virtue of his office, one of the Commissioners who fixed the prices of wines in the City.

It is obvious that the catalogue of many cases given by Tothill and the stray decisions mentioned here are not sufficient for the formation of a just estimate of Bacon's judicial abilities. He lived too soon for his arguments and judgments to be adequately recorded for posterity. That he was equal to the discharge of his duties cannot be doubted. He held office too long in difficult and trying times for his competence to be questioned ; and he appears to have enjoyed the confidence of the suitors in his Court.

There remain his legal writings. These commenced before his forensic debut, and continued long after his judicial career had ended. He was an advocate of codification. Various projects of his are extant which show that he was not blind to the disadvantages that might be involved. It is difficult to believe that in his day the law would have stood for any form of codification. He seems to have attempted a draft in the work on treason and other offences, which sets out in admirably terse language the rules which apply to them, and shows that he would have been an admirable Parliamentary draftsman. His more professional work in opinions and arguments follows the accustomed models of the day. Division and subdivision were then the rule, and the citation of historical events and the works of theologians, historians, philosophers and others was a usual method of supplying

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the gaps or reinforcing the precedence of the English law. Here he held his own with the best, and indeed his style was not so crabbed and obscure as that of his confrères. None of his legal works was published in his lifetime, except a new set of rules of Chancery Practice, which no doubt were based on immemorial usages in the Chancery. Bacon's Chancery rules were esteemed as the best ever published up to his time, and were long used as a standard to judge subsequent rules issued by later Lords Chancellors.

His legal maxims were in Latin with an English commentary. He did not translate, but the opening sentence of each comment is usually a version. The fourteenth may be used as an example of the whole. The maxim is : "*Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio precedens quae sortiatur effectum interveniente novo actu.*" The comment begins :—"The law does not allow of grants except there be a foundation of interest in the grantor ; for the law that will not accept of grants of titles or of things in action which are imperfect interests, much less will it allow a man to grant or incumber that which is no interest at all but merely future. But of declarations precedent before any interest vested, the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent." This comment is clearly an expanded translation of the Latin. The maxim brings to mind the anecdote that once Bacon offered some fishermen five shillings for their catch. The men refused and went to their fishing, but caught nothing. On their return, Bacon reminded them that if they had accepted his offer they would have had a good bargain.

The last three words of the maxim, "*interveniente novo actu,*" in which *actus* bears its classic meaning of act in the law, i.e., conveyance or transfer, has been revived in modern time by Collins M.R. in *Dunham v. Clare*, (1902), 2 K.B. at p. 296, a workman's compensation case, where

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he uses the expression, "*novus actus interveniens*," in which *actus* means event or cause, a meaning which would make nonsense of Bacon's maxim. Various other legal works of Bacon survive, and are printed among his other writings. They show that he had knowledge and understanding, power of exposition and a sense of style, but also that he was not a born monarch in the realm of law. Bacon is inevitably judged by a higher standard than most men. But we must avoid expectations founded upon his superlative intellectual quality. His achievements as a lawyer did in fact surpass those of the vast majority who have devoted themselves exclusively to understanding and expounding the law. His very pre-eminence in other intellectual fields set a standard, when his gifts were applied to law, which led men to expect that in this field too his work should be marked by actual genius. I myself greatly doubt whether he gave anything like his full powers or a very considerable measure of his time to the study of the law. And yet, because he was one of those men *qui nihil tetigit quod non ornavit*, even in this sphere he must in the perspective of judicial history be accounted great. He was diligent and careful; his decisions were just to the best of his ability, and, even after his fall, when the cause was known and such as invited attack, none of his decrees was upset, though many were assailed. It was because he rose so high that he fell so far; and the cause has blackened a noble memory.

It is due to that memory to enter a plea in mitigation, though not in excuse. He lived in days when it was recorded of one judge as a thing of wonder that he took no presents. It was the custom which all knew and allowed for. Few, if any, of his contemporaries, judged by the rule that a judge must take no profit from his office save his appointed salary, could escape condemnation. That the feeling was against accepting presents from parties to *pending* suits must be admitted, and it was because

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Bacon did accept such presents that he was condemned. Yet it cannot be affirmed with certainty of any of the judges then that they did not accept such gratifications. Bacon had for several years been as law officer the recipient of gifts from corporations and others who looked to him for favour, and the practice was known and allowed. As Chancellor, he received many fees which were the perquisites of his office, and their scale and the occasions when they were justly due were ill-defined. It was easy, especially to a man who loved means, and had known and dreaded poverty, to slip almost unawares into the fault that he committed. He declared, and the evidence supports him, that he had not allowed the gifts to warp his judgment, and, while in the deepest disgrace, averred with emphasis that he was the justest Chancellor since the days of his father. The times were evil, and the practice was bad. The interests of justice demanded a victim, and Bacon was destined to be the sacrifice. That he deserved his fate cannot be denied, but he deserves also a milder judgment from those to whom he appealed in the noble words of his will : " For my name and memory I leave it to men's charitable speeches and to foreign nations and to the next ages."



## SIR EDWARD COKE

OF all the long line of judges who have rendered England famous among the nations for the excellence and impartiality of the administration of justice the chief place has been unhesitatingly awarded to Coke. To him, in no small degree, may be attributed the victory of the Common Law over all the rival systems and influences which threatened it; he it was who maintained the supremacy of the Common Law Courts over all other Courts, save that of the Chancery; to him is largely due the formulation of those constitutional principles upon which the government of the Empire rests. His stand for the independence of judges and the rule of law made him famous among his contemporaries. His skill in propounding and maintaining legal propositions was a potent factor in restating the Common Law as it had developed in mediæval precedents, so that it became a system capable of congruous expansion, a body of rules apt for the settlement of the affairs of a great nation.

He was born in the days when the Reformation settlement was yet in danger, and he lived to the eve of the Civil War. For the greater part of his life he was regarded as a man of outstanding merit, first as lawyer and advocate, and, when he became a judge, as the exponent and guardian of the principles of liberty. His fame has been confirmed by the opinion of succeeding ages. So pre-eminent did he become, to such an extent was he regarded as the champion of the Constitution, that his own generation willingly forgave his failings.

His father, a barrister of Lincoln's Inn, was a member of the well-known Norfolk family. Edward, the only son



THE RT HON SIR EDWARD COKE  
LORD CHIEF JUSTICE OF ENGLAND

From a picture formerly in the Hall of Serjeants Inn, Chancery Lane



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of eight children, was born at Mileham in Norfolk on 1st February, 1552. At no time in his life did he feel the pinch of poverty, but his love of money led him to adopt ignoble means to acquire a superabundance of riches. On the other hand, his industry is the more remarkable, for easy circumstances have often proved an obstacle to young men of brains.

He received the usual classical education of the time at the school at Norwich and at Trinity College, Cambridge. In 1571 he entered Clifford's Inn, one of the Inns of Chancery where lawyers were then accustomed to begin their study of law. On 24th April, 1572, he became a student of the Inner Temple, where he soon gained a reputation in the legal arguments in the Hall, then held at all the Inns of Court, though now only surviving at Gray's Inn. He was called to the Bar on the 20th April, 1578.

At that period it was usual for young men of family to study at the Inns of Court, and call to the Bar did not of itself confer the right to practise. As a rule, the barrister was expected to attend the Courts for a further period before he was allowed to practise. Such, however, was Coke's early reputation that his novitiate lasted but a short while, and he acquired a practice at a very early age. By 1579 he was counsel for the defendant in an action for defamation brought by Lord Cromwell (4 Rep. 13), and it is characteristic of him that he records a mistake of tactics that he made, as a warning to others. In this year he was made Reader of Lyon's Inn, one of the three Inns of Chancery depending on the Inner Temple. This was a responsible position not usually entrusted to anyone called less than ten years; the Reader was answerable for the conduct and training of all the students there.

In 1581 he was one of the counsel for the successful party in *Shelley's Case*, (1 Rep. 94), one of the landmarks of English law, with which to this day every student of

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law must make himself familiar. By that early date he had acquired a great professional reputation and a lucrative practice.

In 1582 he married. His wife, Bridget Paston, was an heiress of the Pastons of Norfolk. She brought him £30,000 and a great landed estate, so that when he was thirty he was a wealthy man. Shortly afterwards he began to receive the outward marks of a successful advocate. In 1584 he received a standing retainer for the Corporation of Ipswich. In 1585 he became Recorder of Coventry ; in 1586, of Norwich. In 1589 he was elected to Parliament as Member for Aldeburgh, and the next year became a bencher of his Inn.

1592 marks a definite change in his career. He became a law officer, and thence, until raised to the Bench in 1606, he was continuously in office. In 1592 he became Solicitor General, Recorder of London, and Speaker of the House of Commons, where he sat as one of the Members for Norfolk. As Speaker, he was responsible for the general conduct of business, somewhat like the present Leader of the House. His behaviour in the chair was remarkable for its dexterity. The position was a delicate one, since Elizabeth hated the ecclesiastical debates to which the Commons were addicted. During his Speakership, 1592-1593, there were abundant opportunities for making enemies in either camp, but he avoided them all.

His career at his Inn continued to progress. In 1592 he was Reader. This office was one of great importance. The Reader delivered lectures in Hall, and gave a notable feast to which the great men of the land were invited. Coke read on the Statute of Uses, and, when the Plague caused him to break off the course of lectures, he was honoured by being escorted on his way to his country home by an array of benchers, barristers and students.

In 1594 the office of Attorney General fell vacant, and Bacon became a candidate against Coke. This unexpected

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rivalry from a younger man, who was then, though prominent in politics, not much more than a lawyer in name, but whose candidature at one time threatened to be successful, led to ill-feeling between the two men, which, though often smoothed over, broke out recurrently during their lives. On this occasion Coke was appointed to the vacant office, and Bacon transferred his efforts to gain the Solicitor Generalship. Coke had no desire to foster such a rival, and contrived to keep that office vacant until 1595, when another man was appointed. In the meantime Coke fulfilled the duties of both offices.

With his private means and private practice added to his official income, Coke's income was, at this period, such as would even now be regarded as exceptional. Contemporary reports recorded his appearance in case after case, though they are not given to mentioning the names of counsel. One reporter, Goldsborough, actually made special mention that the "celebrated Mr. Coke" appeared. In 1596 he became Treasurer of the Inner Temple, the highest office in that Society, and thereafter for many years he was the most powerful man at that Inn.

On 27th June, 1598, his first wife died, but he was soon consoled. He, with Bacon and others, sought the hand of Lady Hatton, a young widow of twenty, and grand-daughter of Burleigh, who had a very large fortune. In spite of Coke's age and unattractive personal appearance, he was the successful suitor, but, the young lady declining to be wedded publicly, they were married privately in contravention of the law. The fact that the great lawyer was caught off his guard caused huge amusement. The marriage was not a success, and Bacon was consoled by the opportunities he had of assisting Lady Coke in her incessant disputes with her husband, which became a matter of public notoriety.

As Attorney General he was responsible for initiating a series of prosecutions for libel—nearly, but not quite, an

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innovation. His views on the law of defamation were very decided, but have not been followed by later judges. He thought that public criticism of public officials and private individuals, living or dead, was to be repressed, whether the criticism was true or false. (*Case de famosis libellis*, 5 Rep. 125 b.) This is curious in view of the fact that he seems to have shared the repugnance of the judges for civil actions for slander.

In 1600 he began the publication of his *Reports*, of which eleven volumes appeared up to 1615; the remaining two were not published until after his death. In that year he appeared in the prosecution of Essex and Southampton.

In 1601 he was honoured by a visit from Queen Elizabeth to his house at Stoke Poges. This proves that his wealth was immense, for the course of a Royal visit was marked by festivities which could only be borne by persons of exceptional means.

The accession of James I made little difference to Coke. He continued in office and prosecuted Raleigh for high treason in 1603, and the Gunpowder Plot conspirators in 1605. This was the last great case of his career at the Bar, which closed in 1606 on his appointment as Lord Chief Justice of the Court of Common Pleas.

James had manifested a strong tendency to absolutist principles, and it fell to Coke to withstand his various attempts to interfere with the administration of justice and to supersede the law of the land. Coke carried out his duty with great tenacity and dexterity, but, on occasion, at the expense of his dignity. More than once, in a scene with the King, he grovelled on his knees. As Chief Justice of the Common Pleas, he presided over the Court where most of the disputes arose, and for this reason Bacon suggested, in 1613, that Coke should be transferred to the Court of King's Bench, a position of more dignity and less labour, but not otherwise so desirable. His appointment was made in an unusual way by writ and

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not by patent. He was reluctant to go, and bore malice against Bacon, who was behind the whole affair. During Coke's tenure of the office he was styled Lord Chief Justice of England, an innovation for which reproaches were levelled at him. He was also sworn a Privy Councillor. In 1614 he became High Steward of Cambridge University.

In 1615 began the controversies which led to his dismissal. The Court of King's Bench embarked on a dispute with the Chancery. It was held by the Common Law Court that the Chancellor could not interfere in matters governed by the Common Law or on which a Common Law Court had adjudicated. The dispute became acrimonious, and Coke, so it is believed, brought about the presentation of certain bills of *præmunire* against persons who had become suitors in the Chancery after judgment given in a Common Law Court. The Grand Jury threw out the bills. The disputes continued, and the crisis was reached on a point relating to Commendams (the holding by a bishop of livings in plurality, see *Hob.* 140). Coke, who had, by his zeal in the trials relating to Overbury's murder, given great offence to Court circles (it was whispered because he might have discovered the truth), was in disfavour. He refused to submit to the King's demands, and would only promise to do what an honest and just judge might do: Bacon was working against him, because there was, in spite of all this trouble, a danger that the latter might become Lord Chancellor and thus again defeat Bacon's ambition.

On 6th June, 1616, the Privy Council met to consider what was to be done with Coke, who sent to the Queen begging her to intercede for him. On 26th June three charges were formulated and on the 30th he was suspended, being directed during his suspension to consider his *Reports* with a view to correcting their errors. On the 2nd October Coke presented his list of errors, five small



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unimportant mistakes. On the 17th he was given a counter list of five to consider. This list had been compiled by Bacon and Yelverton, a circumstance which excited adverse comment from the profession and others, for it was felt that their eminence in the law did not justify their sitting in judgment on the works of such a man as Coke. The latter, however, ingeniously dealt with, and evaded, these criticisms on his books. Obviously, there was no easy way of putting him down except by dismissal, and he was dismissed accordingly. This made him a popular hero, and his reputation rose even higher.

Soon afterwards his matrimonial affairs again gave rise to scandal. Whatever may be said about his legal rights, his behaviour in matters domestic does not redound to his credit. He determined to marry his daughter by his second wife to a brother of Lord Buckingham. The child was only fourteen, and Coke's motive can only have been to promote his interests with the King's favourite. His wife took the girl away. Coke obtained a warrant, after a first refusal from Bacon, and forcibly recovered his daughter. The wife appealed to the Privy Council, warmly supported by Bacon, who caused an information to be filed in the Star Chamber. As the law then was, Coke had an irresistible case, and James' views on disobedient wives earned Bacon the King's censure for his action. The marriage was unfortunate. The child-wife soon ran away with a more congenial companion. Coke and his wife became reconciled in 1621, but from time to time during the rest of his life he was worried by incessant disputes and insults.

He was far too influential a man, even after his dismissal, for the King to ignore. He was soon consulted, and by 1617 had resumed his place in the Privy Council. It was rumoured in Court circles that he was to be made a peer. He often sat in the Star Chamber, and was a member of a number of commissions. He became, for a short time, one of the Lords Commissioners of the Treasury.

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He was regarded as a supporter of the King when, in 1620, James commanded his election to Parliament for Liskeard. In this memorable Parliament Coke definitely took the popular side. He was a member of the committee for drawing up charges against Bacon, but he does not appear to have been animated by any bitter feeling against the accused, though he cannot have been displeased. His chief service was to dissuade the Commons from accepting the King's suggestion of trial by a novel tribunal, and to adopt the constitutional method of impeachment. Bacon admitted his guilt, and the King was able to dismiss his unpopular Chancellor without losing prestige.

Coke was now definitely ranged against the King. He promoted the address against the Spanish marriage, and spoke in the debate on the Liberties of Parliament, a debate which caused the King to tear the entry out of the Commons' Journal, and to arrest the chief speakers against him. Coke was in custody for nine months. His papers were seized ; he was examined on a number of occasions ; suitors were stirred up to sue him in respect of matters which had come before him as judge ; but, in spite of all efforts, nothing definite could be charged against him, and on his release in 1622 he was merely removed from the Privy Council.

In 1624 he was elected for Coventry. An attempt was made to silence him by placing him on a commission to go to Ireland to inquire into abuses there, but the device was too obvious to succeed. He took a leading part in the impeachment of the Earl of Middlesex for his misdeeds as Lord High Treasurer. A partial attempt at conciliation brought him back to the Privy Council.

On 27th March, 1625, he was returned as Knight of the Shire of Norfolk. In the session which followed he was prominent in the Commons' insistence on redress before supply. In 1626 he was again elected for the county, but had been made a sheriff, and a decision of his own in

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a previous case made it impossible for him to sit while sheriff, though the election stood. In the Parliament of 1628 he had the unusual honour of being returned by two counties, Bucks and Suffolk, and elected to sit for the former. He spoke against forced loans and brought in a Bill of Liberties, which, after debates in the House, became the Petition of Right, a statement of constitutional principles which is one of the landmarks of the Constitution.

His readiness in a difficult situation was shown in the course of a debate during which the Speaker, acting on royal instructions, stopped Eliot from commenting on the actions of the Duke of Buckingham without naming him. This interference with the liberty of debates by the Speaker, whose duty is not only to keep debate within proper limits but also to guard the privileges of the House, caused a painful scene. Members did not know what to do, and a disorderly tumult might have arisen but for Coke, who rose in the middle of the hubbub and mentioned the Duke by name. This effectively spiked the Speaker's guns, and the crisis was over. With this session Coke's public career ended.

For the remaining years of his life he lived in retirement, quarrelling with his wife, who refused to take his name, which she, to annoy him, would spell as Cook, and openly lamented her husband's inconvenient health. He was tenderly nursed by the daughter whom he had sacrificed to his ambition. In 1630 a man named Jeffs was convicted of libelling him. Nothing worthy of note occurred until he died on 3rd September, 1634.

The King had been waiting for this event, and all Coke's papers were immediately seized. Many, including his will, were never recovered. Although sufficient remained to form the 12th and 13th volumes of his *Reports*, and other legal works were also published, it is possible that yet other manuscripts, prepared with a view to posthumous publica-

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tion, may have been suppressed, though by this time there is no chance of rediscovering them.

Coke's career may be discussed from many points of view. It would be tempting to write his life as a contest with Bacon for place and power, but to do so would not do justice to either man. I have already, in these pages and elsewhere, dealt with these rivalries, but it must be admitted that each earned his title to fame in branches of knowledge where the other was no serious rival. Bacon did indeed write on law, but not so as to challenge Coke's pre-eminence. Coke actually despised Bacon's work in philosophy, and, in the copy of the *Novum Organum* presented to him by the author, he wrote a couplet to the effect that the book was fit cargo for the "Ship of Fools." Bacon did not challenge Coke as a legal writer: Coke could not have shone as a philosopher even if he would. The career of each man, influenced though it was by the other, probably would not have very materially differed had the other never lived.

Coke's career at the Bar is remarkable, not merely because he was admittedly supreme—many in their day have led the legal profession—but because he combined the excellences of the lawyer and of the advocate in a manner hardly to be matched. He was a master of the intricacies and subtleties of the precedents, which had not then been gathered into systematic treatises, for which, indeed, the Common Law was probably not then ripe. It is not easy to realize the arduous task which confronted the lawyer in those days. A long training was indispensable, and so difficult was the work that it is not surprising that the tradition arose that law was an occult mystery, a view that cannot be justified at the present day. It was necessary to decide which Court had jurisdiction, and there were a number of competing Courts with indefinite jurisdiction; each with its own procedure, mostly archaic and needing revision, full of pitfalls. Printed authorities were

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not always available, for much of the law was still in manuscript. The lawyer had to be able to read mediæval manuscripts written in law French in various stages of unintelligibility, in law Latin of varying degrees of excellence, and in English. Many of the printed books were in black letter. Neither he nor the Court could ever be certain that all the relevant authorities had been cited, and many were based on obsolete procedure or repealed Statutes. There was no authoritative collection of the Statutes at large. The Common Law reports were in French, pleadings in Latin, and arguments conducted in English. In the Chancery matters were not so bad. English was used, precedents had not become binding, and Bacon's rules of procedure were a model for the time. Even granting that the Reports record unusual and difficult points, and that most cases turned on mere questions of fact tried in a manner familiar to all at that date, it is impossible to withhold admiration for the men who were not only able to make such a system work, but did it in such a way that their opinions and decisions, arranged and digested by their successors, formed the body of the Common Law, an admirable system which still governs the difficulties and disputes of the modern world in conditions of which the old lawyers had no conception. Among these lawyers Coke reigned supreme.

Of late years there has been a tendency to depreciate him. No doubt he is not entitled to unrestrained adulation, but there is a danger that criticism may lead to undue belittlement. One fact must never be lost sight of—that without Coke the great principle that the rule of law is supreme might not have been established. As a lawyer in practice, he was not concerned with the constitutional issues which became vital when the Stuarts succeeded the Tudors. Under Elizabeth and the first few years of James' reign he was absorbed in his work at the Bar, helping to build up the Common Law, and his advocacy was exercised

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on the side of authority. It is unfortunate that the records which enable us to study Coke's methods at the Bar are mainly Crown prosecutions, which, at that date, were conducted in a manner repellent to modern ideas. As Attorney General, he was responsible for initiating a series of libel prosecutions on a scale before unknown. He honestly believed that public criticism of persons in authority was blameworthy, however justified it might be. If such persons did wrong, their action should be challenged in Parliament or the Law Courts. This point of view is consistent with the whole tenor of his life. He never was an enemy of authority ; he was only roused when authority exceeded the limits laid down by the law. To such offenders as Essex and Raleigh he showed no mercy. To defy authority in a manner forbidden by law was to him the most serious of offences, and presumably formed the justification to himself of the rancorous malignity with which he pursued such offenders, both as advocate and as judge. Nevertheless, the methods he adopted and the language he used to such a man as Raleigh are a blot upon his career, and are best condemned in the words of rebuke he addressed to the defendant in *Wrennum's Case* : " Take this from me, that what grief soever a man hath, ill words work no good, and learned counsel never use them." He was persistent and overbearing, so that his colleagues at the Bar found him trying and the judges were made restive. His power of stating his propositions in clear language and supporting them by a wealth of authorities, seemingly overwhelming, obscured in his advocacy the want of order and logic which became apparent when he committed them to writing.

As a judge, he was consistent in his zeal for following the principles of law, but, like many another judge of acknowledged learning and great personality, he was not sufficiently aware of the need to listen to argument, which in his Court tended to be a discussion of the law by the

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presiding judge. Open contempt for counsel's arguments he often expresses in his *Reports*, and it is unlikely that he abstained from indulging in such comments during the hearing. As a man of strong views, he was subject to the failing that, to his mind, his opinion was the law, and precedents cited in support of a contrary view he wrested to his own support. On the Bench and in his writings he was always in a sense the advocate striving to force acceptance of his opinion, and he certainly dominated the puisne judges of his Court. "I, my Lords," he might well have cried, "I, my Lords, embody the Law."

His championship of the jurisdiction of the Common Law Courts may easily be over-emphasized. The insistence on their supremacy was not a peculiarity of Coke, nor, indeed, did he originate the disputes; they began before his time. He was generally supported by all the other Common Law judges, since their views and interests agreed with his.

The Common Law was threatened from several quarters. In the first place, James was convinced that he was the supreme judge, and made a number of attempts to assume jurisdiction. In one case (*Prohibitions del Rey*, 12 Rep. 64) Coke tells the story how, on the 10th November, 1607, the King, on the prompting of the Archbishop of Canterbury, exclaimed against prohibitions to Ecclesiastical Courts issued by Common Law Courts to prevent them exceeding their jurisdiction. The King intimated that he might try the case himself, as the judges were merely his delegates. Coke informed him that the King could not in his own person judge any case whether criminal or between parties. The reasoning is defective, but enough justice has not been done to Coke's argument, for he could not ignore the precedents of more primitive times, of which James was well aware; the skill with which he supported the only true principle of judicature suitable for his own days in the face of those precedents

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is a tribute to his ingenuity as an advocate and courtier. Finally, the King pointed out that Coke's argument involved the King being under the law, which it was treason to affirm, but Coke countered this by an apt quotation from Bracton, who had stated Coke's proposition in as many words.

James interfered personally in many of these disputes, especially with the Ecclesiastical Courts, and it says much for Coke that he persistently maintained his point of view, though often with a servile obsequiousness to James which severely injured his dignity.

Coke's principle was that the judges were bound to administer justice in accordance with the law, and that without a Statute the law could not be altered. A judge could not do his duty if he failed to apply the law, no matter what other considerations existed. Thus, when James wished to forbid building in London by proclamation, the judges were consulted and advised that the King could not by proclamation change any part of the Common Law or Statute Law or the customs of the realm. All that they would allow was that, if the King prohibited by proclamation acts which were unlawful, it was a circumstance of aggravation. Coke adds :—"The King hath no prerogative but that which the law of the land allows him" (*Case of Proclamations*, 12 Rep. 74). In another case, Coke gives it as his opinion that, "the laws and customs of England are the inheritance of the subject which he cannot be deprived of without his assent in Parliament" (12 Rep. 26, 29). Sentiments such as these, inasmuch as the Common Law Courts were the only means whereby subjects could be assured of their rights when in conflict with royal views, were bound to earn for the Chief Justice the enthusiastic support of all opponents both of the encroachments of the King upon the province of Parliament and also of those Courts which, under his patronage and domination, were prepared to



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exercise jurisdiction according to principles more in accordance with the Sovereign's conception of his divine right. Coke was not an enemy of the prerogative ; he was merely insistent that it was limited to the sphere which the law allows. Thus, his notes on the *Exaction of Benevolences* (12 Rep. 119) show that he was not prepared to pronounce them illegal where no attempt was made to force unwilling subjects to subscribe. He certainly subscribed himself. He was not called upon to decide *Bate's Case* (11 St. Tr. 30) upon the King's power to impose customs dues, but he was asked to advise upon the decision. His view was that the King could not at his pleasure impose duties on imports or exports unless it were for the advancement of trade or traffic—a rule which, as Hargrave notes, is more favourable to the King than the actual law.

The disputes with the Ecclesiastical Courts occurred on many occasions. Coke maintained throughout that these Courts could not fine or imprison an Englishman except in cases expressly allowed by Statute, nor would he countenance their practice of interrogating people as to their private opinions with a view to establishing a case against them. Thus, in *Chancey's Case* (1611), the Court had bailed a man committed by an Ecclesiastical Court for adultery and had intimated that he would be released on *habeas corpus*. The King took up the dispute because the Court in question, the Court of High Commission, was constituted by royal authority, and the Archbishop relied upon the Statutes vesting all ecclesiastical jurisdiction in the Crown. The judges were separately consulted, on Bacon's advice, to prevent them from being influenced by Coke, whose authority outshone their own. He was firm that the Statutes merely vested in the King such jurisdiction in matters ecclesiastical as was allowed by law and could not be extended except by Parliament. The matter ended by the King promising to reform the Commission, but even then the judges of the Common Pleas would only

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promise that when they saw the new Commission they would "seek as to that which is of right to satisfy the King's expectation." The next Commission contained Coke's name so that he should not be able to complain of what was done. He attended, but refused to sit until the Commission was read, and then made criticisms which showed that the new Commission was not in accordance with the law, and thus he regained his liberty of action.

The dispute with the Admiral's Court really turned on the jurisdiction over commercial matters. With few exceptions, the Courts administering the Law Merchant had fallen into decay, and, naturally, disputes between merchants who were accustomed to have recourse to the Admiral's Court in matters maritime found their way to the same Court. Here there was some real objection to the Common Law Courts. Proceedings in the Courts Merchant were summary, for merchants needed to have their disputes settled quickly while they and their witnesses were available, and the Court of the Admiral could give speedy trials, which the course of procedure in the Common Law Courts did not then permit. The Admiralty Court's claim to jurisdiction involved, unfortunately, the result that commercial causes would be decided in accordance with the principles of Civil Law. Matters arising on land had been outside the Admiral's sphere. Before then the Common Law Courts had not asserted jurisdiction in matters arising in lands beyond the seas, but, as a result of Coke's victorious attack on the Admiralty Court, the jurisdiction of that Court was strictly confined to matters arising on the high seas. The jurisdiction thus acquired and kept for the Courts of Common Law was not exercised in a manner calculated to assist merchants, and it was left to later judges to frame a procedure and formulate principles which were adequate for that purpose.

The peculiar jurisdictions entrusted to the President of the Council of the North and the Court of the Welsh

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Marches were also jealously scrutinized by the Common Law judges. As early as 1606 the President of York complained of prohibitions against proceedings before his Court, but Coke was able to convince the King that the Common Pleas had the power. He explained that if that Court held pleas without authority, and prohibition could not be granted, then "the subjects shall be wrongfully oppressed without law, and we restrained to do them justice" (13 Rep. 30).

The final dispute was with the Court of Chancery. This is not the place to deal elaborately with this celebrated controversy, which lasted for many years until a working arrangement was gradually evolved. Coke did not succeed. In *Heath v. Rydley*, (1615, Cro. Jac. 335), the King's Bench held that a Court of Equity cannot intermeddle with matters of law. The reason Coke gave is notable. There were methods of upsetting a wrong verdict or erroneous decision, but none of them applied to the Chancery. The rule was indeed recognized, but, like many other rules, the dispute lay in the application of it. Later, in *Courtney v. Glanvil*, (1615, Cro. Jac. 343), the King's Bench held that where a decision had been come to in a Common Law Court, the Chancery could not intervene. The quarrel between him and Lord Ellesmere became acute, and Coke proved intractable. After a long struggle, he was deprived of office.

His *Reports* had ended in 1615, and his only public appearances in legal matters were in the Star Chamber, sitting as one of the judges. Except, therefore, for the constitutional arguments which he delivered in debate on the liberties of the subject and the privileges in Parliament, his contribution to the science of law consisted, after his disgrace, in the books he published. The formal treatises appearing during his life were few in number. The earliest appears to have been his celebrated Charge to the Grand Jury at Norwich Assizes, 1607. In 1614 he issued

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his *Book of Entries*, a work on legal procedure. His *First Institute* was published in 1628, and the only other was the *Complete Copyholder* in 1630. After his death, there were published a book on *Bail and Mainprise*, 1635, the *Second Institute*, 1642, the *Third* and *Fourth Institutes*, in 1644, his reading on the *Statute of Fines*, 1662, and a few other writings.

It may be doubted whether Coke consciously worked for posterity. In all his writings his dominant purpose appears to have been to sum up all the available material so as to render it accessible to working lawyers, who, by that time, were beginning to lack the learning which had hitherto enabled them to become masters of their art. This purpose cannot be fulfilled by the printed word without also assisting future generations whose peculiar disputes and doubts must resemble those which have been resolved in earlier times, and be capable of resolution by principles laid down in the earlier decisions. Coke, in his published writings and reports, so gathered up the past precedents, and so bound them together for the benefit of his own generation, that he transformed the Common Law into a living system capable of regulating the lives and fortunes of a developed civilization extending over the world. It must be conceded that he was not the first nor was he alone in this work. He was only one of many, and the process is one which has gone on ever since, and must continue if our law is to remain a living jurisprudence. Every reasonable system of law reflects the customs and habits of mind of the people who follow it, and no one man can justly claim the credit for a work which is the achievement of all, as a coral reef is of the myriads of coral insects. Still, it is his glory that he excelled all others because he knew the wisdom of the past, and gathered it into his works while it could still be garnered, and that, while he was protecting the Common Law from encroachments on all sides, he was laying down those

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principles of civil liberties which he had read in the ancient precedents and which were soon to be consecrated by blood. He was the great exponent of the law which is the keystone of the Constitution and the safeguard of liberty.

There is no need to deny his manifold faults. His mind was disorderly ; at times he was more of the advocate than the judge ; he had no great power of analysing words ; his divisions of the subject matter were not seldom pedantic and too technical, even where the settled practice had not deprived him of a free hand in arranging his material ; he was, as Bacon said, a huddler who gathered together a learned collection of notes—a quarry rather than an edifice ; his etymology is faulty—truly Elizabethan ; and oftentimes his logic was demonstrably unsound. As Hobbes laments, “ Truly, I never read weaker reasoning in any author on the law of England than in Sir Edward Coke’s *Institutes*, how well soever he could plead.” Nevertheless, it was all there, with the inevitable mistakes and blunders, a massive substructure for later lawyers, who, building on his foundations, have raised an edifice, fairer, indeed, but out of his materials ; without him, they might not have built at all. The wonder is not that he made blunders, but that they were so few. His excellence consists in two main points. First, his statements of propositions are clear. Secondly, he gives all the materials. Time and time again he gives a proposition, luminous and exact, accompanied by a wealth of authority, not always relevant but always *in pari materia*, and, though the argument leading up to his conclusion may have halts and pauses, and even fail to support it, yet his faculty of seeing the right conclusion is almost unerring, and its very existence was a hindrance to the establishment of propositions from authorities which, it must be admitted, can never wholly be dispensed with. Sometimes he even yielded to the temptation of misquoting authorities where they clashed with his views.

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Coke's *Institutes* have been described as his most important contribution to legal literature. Stephen, in his *History of the Criminal Law* (ii, 205), said that they had a greater influence on the law of England than any work written between the days of Bracton and those of Blackstone. The statement is too sweeping. The four *Institutes* do not, even with the *Book of Entries*, contain a comprehensive survey of the whole law. The *First Institute* is a comment upon Littleton's *Tenures*, an admirable work on the law of land, compiled by one of Edward IV's judges. He overlaid this work with notes, and succeeding editors continued to add more and more notes, until it became too complicated and difficult. The *Second Institute* was a comment on certain selected Statutes, and thus never gave the whole Statute Law, besides becoming more out of date as the work of Parliament went on. The *Third Institute* on Criminal Law was eventually replaced by the works of Hall, Foster, and Hawkins. The *Fourth* on the jurisdiction of the Courts was an invaluable treatise for many years, but has now finally ceased to be of practical use, save on the rarest occasions.

The real importance of his works lies in his *Reports*. These are not reports in the modern sense. Frequently they are collections of precedents grouped round a case so as to form a complete, or almost complete, compendium of the authorities on the point for decision. He was not the earliest reporter, but by far the best of his day, so much so that while he was issuing his *Reports* others ceased to publish. One case, indeed, he completely misrepresented. That is *Gage's Case*, (5 Rep. 45b. See 1 Salk. 53, Wils. 569). So great is his authority that statements he makes without quoting precedent are received as law. As Chief Justice Best pointed out in *Garland v. Jekyll*, (2 Bing at p. 296) : "The fact is that Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in West-

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minster Hall if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense." So, too, Lord Blackburn, in *Hoakes v. Beer*, (9 App. Cas. at pp. 616, 617), after pointing out that Coke had reported in *Pinnell's Case*, (5 Rep. 117), an *obiter dictum* as if it were an actual decision, added that it was clear that Coke deliberately adopted the dictum "and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law is a mistake."

It is necessary to distinguish between the eleven volumes he issued and the two published during the Commonwealth. These were not prepared by him for publication. Many of the entries there are memoranda prepared for his use in his constitutional and other controversies, and are not reports at all. Some of the cases are mere notes. Some appear to have been prepared for publication. One, at least, *Thomlinson's Case* on the jurisdiction of the Court of Admiralty, was omitted from the seventh volume by James' orders. As many of the cases in these last two volumes turn on the disputes which caused so much friction with the King, it may be conjectured that he withheld publication of them from motives of prudence. They are valuable in that they give his views on many matters of constitutional and legal importance, but they lack the authority of the volumes which he himself issued to the world.

These remarks do not apply to the first eleven volumes of *Reports*, which cover a period of forty years, and contain a collection of important cases, nearly all of which have been cited and relied upon time after time in later years. Almost all form the starting-point of subsequent decisions. Such was the reputation of these *Reports* that they were

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cited as *The Reports* ; there was no need to add the reporter's name, as in the case of all other series.

He never deemed himself confined to a bare report. In Anderson's report of *Shelley's Case*, (1 and 71), there is a comment that Coke put a good deal into his report which was never said in Court, and this is true of many other cases. His own views on reporting law cases are given in *Calvin's Case*, (7 Rep. 1), where (at fo. 4a) he says, "Howbeit, seeing that almost every judge had in the course of his argument a peculiar method, and I must only hold myself to one, I shall give no just offence to any if I challenge that which of right is due to every reporter, that is, reduce the sum and effect of all to such a method as, upon consideration had of all the arguments, the reporter himself thinketh to be fittest and clearest for the right understanding of the true reasons and causes of the judgment and resolution of the case in question." One may guess that in that particular instance he was merely giving an excuse for making his own judgment the basis of the report, but it does state a truth which must not be lost sight of, that, in the older reports, the reporter assumes the duty and responsibility of stating the case, and does not warrant more than that he is giving the substance and effect of the decision as accurately as he knows how.

His arrangement of his *Reports* is chaotic. Obviously, at times, he is grouping cases together under convenient headings, but this method struggles for mastery with the rival method of setting them down in chronological order. Moreover, he frequently commences a new volume with a specially important case, and thus upsets all order. At first, nearly every case was preceded by the pleadings in full, a most valuable practice for the lawyer, but as time went on the pleadings appear less frequently, and eventually they are only found annexed to special cases. He never deemed it his duty to confine himself strictly to the case



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before the Court. He adds edifying remarks, practical comments on the law or on points of pleading, and even explains why he reports the case. This habit, which made the volumes a convenient text-book for particular points, led later editors to add notes to bring the law up to date, with the result that a layman, consulting a late edition, may well be appalled at the confused mass of undigested and often unrelated points there printed.

Certain cases he deemed so important that everything must be gathered in. Thus *Sutton's Hospital*, (10 Rep. 1) concerning charities and the formation of corporations is thus treated by him. First, the pleadings are set out, covering 44 printed pages ; then comes a head note stating in summary form the facts and points decided ; after that the way in which the points arose for decision is explained, followed by the names of counsel (an exceptional occurrence) with the points raised in argument, accompanied by a contemptuous comment. After that he mentions the judicial discussion, giving the names of the judges, winding up with a reasoned statement, accompanied by authorities, of the effect of the rulings upon the points raised. At the end of the report he mentions that two of the judges at first dissented and then agreed, and that Lord Chancellor Ellesmere also agreed with the judges. Then follow a few words of practical advice ; after that an appreciation of Fleming, the Lord Chief Justice, who had fallen sick on the first day of the hearing and died before judgment. Next, he gives his reasons for reporting the case, adds a list of authorities not mentioned in the body of the report, and appends a list of the original Governors of Sutton's Hospital and the changes that had taken place to date. The only peculiarity of his which this case does not contain is a discussion of authorities on the subject not expressly dealt with in the case. Indeed, in the last case in the fourth volume, *non compos mentis*,

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the report ends in a general discussion of the law on the subject.

Notes of such a character from a man of ripe learning and great experience, who actually appeared in many of the cases as counsel or judge, had a peculiar authority ; and such reports, forming as they did the working tools of a practising lawyer, had the greatest possible effect in the development of the Common Law by judicial decisions.

The "long title" to these volumes is interesting as illustrating, not only the courteous references to the reigning monarch then customary, but also the fact that the terms which were deemed adequate for Queen Elizabeth, notorious for her love of flattery, were apparently inadequate for her successor, though he was a man. Thus, the first volume states that it contains reports of cases decided "during the most happy reign of the most illustrious and renowned Queen Elizabeth, the fountain of all justice and the life of the law," but the first to be published under King James alters this to "published in the first year (the springtime of all happiness) of the most happy reign of the Most High and Most Illustrious James King, etc., the fountain of all piety and justice and the life of the law."

It is perhaps fair to give an example of Coke's writing which illustrates both the strength and weakness of his mind. It leaves no doubt as to his meaning, but his main division of the subject is left without a companion, and his subdivisions of that main division are confused and illogical. His reasoning is not conclusive, but there can be no doubt as to what he is advocating ; indeed, so clear is it that one may conclude that his mind outstripped his pen and left the gaps which appear so patently in the argument. I have chosen a comment which has little relation to the law. It is printed at the end of *Tyrringham's Case*, (4 Rep. 39a).

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*Nota*, reader, it is true that agriculture and tillage is greatly respected and favoured as well by the Common Law as by the common assent of the Kings, the Lords Spiritual and Temporal, and all the Commons in many Parliaments.

I. The Common Law prefers arable land before all other, and therefore for its dignity it ought to be named in a *præcipe* before meadow, pasture, wood or any other soil ; and it appears by the Statute of 4 Hen VII cap. 19 that six inconveniences are introduced by subversion or conversion of arable land into pasture tending to two deplorable consequences.

The first inconvenience is the increase of idleness, the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons and curates. 6. The defence of the land for want of men, strong and enured to labour, weakened and impaired.

The two consequences are :—

1. These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one Act of Parliament as to this purpose may, as a figure in arithmetic, in the third place stand for one hundred ; but I have observed that the most excellent policy and the most assured means to increase and advance agriculture is to provide that corn shall be of a reasonable and competent value ; for make what Statutes you please, if the ploughman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

One last word on his personal character. He was, as a member of an Inn of Court, accustomed to mix with his fellow men ; but, as was observed by a shrewd critic, he lived rather with books than with men. He was masterful and overbearing ; narrow and bitter in his views, seeing each problem by itself and not as part of a whole. In his domestic life he chose rather riches than love, and paid

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the penalty in long years of domestic strife, becoming in truth a by-word. In matters of religion he was a strict and narrow Anglican, but by no means subservient to the priesthood, whose aims, when in conflict with his views on the Common Law, he controverted with pertinacity and ability.

He lived in times which needed a man of learning and ability, who could adapt ancient precedents to fit the circumstances of a difficult period. He was that man, and the people, though not blind to his faults, chose rather to be grateful for his services. To him poets have paid tribute, and not least, immortal Milton, who hymns Coke as one who :—

. . . . . On the Royal Bench  
Of British Themis, with no mean applause,  
Pronounced, and in his volumes taught, our laws  
Which others at their bar too often wrench.

## SIR MATTHEW HALE

THERE are three spheres in which a lawyer may earn a reputation : as an advocate, as a writer, or as a judge. In an age of specialization men tend to be placed in watertight compartments, and, once a label is affixed, the individual concerned may find himself denied a place in any other category. No advocate is the worse for being a good lawyer. A writer is greatly improved if he has actual practical experience ; and it is indispensable for a judge to have an expert acquaintance both with the science of law and the arts of the advocate. Many advocates have by their fire and eloquence risen to high judicial office, in spite of their deficient grasp of legal principles, but once there they must acquire a sound knowledge of the law if they are to do their duty and earn the confidence of the public whom they serve. Of those who have excelled in the three spheres in which a lawyer may gain reputation, Matthew Hale perhaps challenges the foremost place.

He lived through one of the most troublous periods of English history. He was born soon after the accession of James I, when that monarch had already revealed a policy which would not merely place him above the law, but would render the law his dutiful and subservient instrument. During his youth and manhood the administration of justice had become so involved in political and constitutional controversies that lawyers were perforce drawn into politics, and politicians were apt to base their contentions upon the principles of law. A trial in Court might be, and often was, followed with breathless anxiety by the whole body of the nation. Soon after Hale began practice the struggle was transferred to the field of battle.



THE RT. HON. SIR MATTHEW HALE  
LORD CHIEF JUSTICE OF ENGLAND

From an original picture in the Library of Lincoln's Inn



## *Sir Matthew Hale*

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It is characteristic of the law-abiding nature of Englishmen that the Civil War raged throughout the country without bringing the administration of justice to a standstill. Men still went to law, and many, by the fortune of war or the sport of chance, were arraigned before a jury to answer for their deeds in the fields of politics or of war. For such men, there was an urgent need for efficient legal aid ; and in Matthew Hale they found a man who possessed the ability and coolness of judgment, the learning and courage which alone could enable a lawyer to give the assistance for which they called. Such a man was Hale, who, in days when families were divided among themselves, and friend fought with friend, was chosen by all parties to receive confidences and afford counsel. He was an advocate of renown, a judge of supreme eminence, a cautious and successful reformer, and an eloquent and enlightened writer. Throughout his life he sought to assist the administration of justice without self-seeking or submission to influence. In days when politics might, and did, deflect the course of justice, he was superior to temptation, and earned for himself, alike from contemporaries and posterity, a name second to none in the exercise of those virtues which have caused English justice to become a model for civilization. As an advocate he was sincere, upright and able ; as a judge, wise and single-minded in the pursuit of truth ; and as a writer, celebrated for the depth and width of his learning. He was the embodiment of the judicial mind, and for that reason his bold but cautious reforms were and have since remained an advantage to the community and a monument to his memory.

He was born at Alderley in Gloucestershire on 1st November, 1609. His father had been a barrister of Lincoln's Inn, but had retired from practice because he could not reconcile his conscience to the system of adding untrue allegations to pleadings so as to "lend colour" to the proceedings. At that age the law abounded in



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legal fictions, partly allowed to enable a Court to encroach upon the jurisdiction of other Courts, partly to enable justice to be done in cases where the forms of action and the rules of procedure, if strictly adhered to, would defeat the ends of justice. Such was the allegation that by the defendant failing to pay his debt, the plaintiff had been hindered in paying his just dues to the King. This untrue allegation supplied the means whereby the Court of Exchequer obtained jurisdiction in cases which properly belonged to the Court of Common Pleas. The famous John Doe and Richard Roe enabled parties to try title to land in actions of ejectment. The phantom plaintiff by suing the non-existent defendant might injure the owner's right, so he was allowed to come in and defend, but only on terms that he admitted the fiction. If this or some similar device had not been adopted, a dispute as to title must have been tried in a real action cumbrous and full of pitfalls, where the wrong party might easily succeed on mere technicalities. No one was deceived, and most lawyers hardly even noticed the formal averments which contained the untrue allegations, but consciences were growing tender, and Robert Hale was an honest Puritan. He would not set his hand to a lie, and that meant an end of legal practice as it was then carried on.

The family was Puritan, of Gloucestershire origin. It is said that Robert Hale's father was a weaver of Gloucester. Puritan was Matthew's early training; consigned to a guardian's care at the tender age of five (both his parents being dead), he was brought up in the way of the Saints. This early training made its impress upon his whole life. Though at Oxford he had moments of pleasure and ostentation, they were, on the whole, such as quite a pious young man might enjoy. He became, it is true, an Anglican, but, though never seceding from the Church of England, he was always strongly Evangelical and had leanings towards those Puritans who, by one route or another,

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have become the modern Dissenters. He was educated by a parson of Puritan opinions, but in Michaelmas Term of 1626 he entered Magdalen College, Oxford. There he developed a taste for sports, for drama and the fine arts, and for clothes. His figure and agility enabled him to excel at fencing, a circumstance which, it is said, led him to contemplate a military career, and thereby, indirectly, was the cause of his adopting the law as a profession. It is stated that, intending to enrol as a volunteer for service in the Low Country, he consulted the celebrated lawyer, Serjeant Glanville, as to the effect of such a step upon his patrimony, and the interview had the result of causing him to decide for the law rather than for arms.

Once he had made his choice, he lost no time in making himself a master of the principles of the law. He entered at Lincoln's Inn on 8th September, 1628, and devoted himself to study, in which he was immersed for sixteen hours a day. He read law, both English and Roman, the classics, medicine, natural science, philosophy, and history. He abandoned all show and dressed so plainly and so slovenly that even his Puritan friends remonstrated with him, and it is said that he thereby narrowly escaped being impressed for the West Indies. He gained a great reputation in the legal exercises to which law students were then expected to devote their attention, and he made important friends. He was intimate with Selden and with Vaughan, (afterwards Chief Justice of the Court of Common Pleas), and Hale and Vaughan were executors of Selden's will. He was called in 1637 and became pupil to Noy, a celebrated lawyer who was then a prominent leader of the Parliamentary opposition to Charles, and their association became so intimate that Hale was nicknamed "Young Noy." He has preserved one case in which Noy was engaged by recalling it on a motion before him against a man named Hall for a nuisance in building at Charing Cross a booth for rope-dancing. The Court directed a

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prosecution, and the Chief Justice mentioned that Noy had once moved for a writ to remove a bowling-alley near St. Dunstan's and had it without a presentment, (*The King v. Hall*, (1671), 2 Keb. 846).

During the Parliamentary controversies Noy accepted overtures made to him to join the King's party, and Charles thereby acquired the services of a very noted lawyer, but in the event the recruit did not prove to be a source of strength. He unearthed certain old writs which former Kings had directed to seaports requiring them to supply ships for war service, and Charles accepted them as a means of raising taxes without the sanction of Parliament. The innovation was intensely unpopular, and Hampden successfully objected to it in the *Case of Ship Money*. The dismissal of the judges who had decided against the King increased the prevailing distrust ; people became intensely uneasy when they perceived that the King was capable of subverting the law of the land, and the incident drove many people of standing into opposition, a circumstance which had grave consequences to Charles when the Civil War began. Noy did not live long after his change of party.

Hale did not follow Noy. His austere religious views and reverence for law forbade him joining the Cavaliers. He was, on the other hand, no partisan. He was a constitutionalist, ready as a lawyer to aid persons engaged in litigation, but unwilling himself to engage as a protagonist in political dispute. His practice and his reputation were growing, and in the troubles men of all sides turned to him for help and counsel.

He was not one of the counsel who defended Strafford on his impeachment, but is said to have advised him. He defended Sir John Bramston in 1641, and was one of the counsel assigned to defend Archbishop Laud in 1643. The speech was delivered by Mr. Hern, who, Laud states, "was the man that spake what all had resolved on," but

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there is a note that the speech was composed by Hale, who stood behind Hern and took notes. (1 Harg. S.T. 938). Ultimately, Laud was executed under a Bill of Attainder, the impeachment not being proceeded with. It is said, but probably untruly, that Hale took the Covenant in 1644 ; he certainly sat in the Westminster Assembly of Divines. His influence with the Parliamentary party was nevertheless very great ; to him is attributed the favourable terms granted when Oxford was surrendered during the struggle. In 1645 he defended Macguire on a charge of high treason and unsuccessfully argued that treason alleged to have been committed in Ireland could not be tried in Middlesex. This precedent was much discussed in the recent trials of Lynch and Casement. In 1646 he was assigned to defend eleven members of Parliament charged by Fairfax with munition scandals in connection with the supply of the Parliamentary forces.

When Charles was brought before a special Commission to be tried for treason, he was not represented by counsel. It is said that Hale had the courage to tender his services. Another account is that he did actually advise Charles as to his objection to the power of the Court to try him. This may be the case, but it is hardly likely that the King would need advice on such a point. According to his notions, he was only responsible to God. As King, he alone had the right to set up a legal tribunal. To him, it would have been too plain for argument that the Court had no legal existence or jurisdiction. He would not need counsel. He knew that his death was resolved upon, and the shortest and most dignified course was to deny the right of the Court to try him. This involved his condemnation without evidence. In cases of felony, where trial was before judge and jury, the prisoner could not be tried without his consent, and, if he refused to plead, not being incapable of pleading, or, as the phrase is, "stood mute of malice," his consent was obtained by the *peine*

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*forte et dure*, that is he was pressed to death, unless he ended the ordeal by agreeing to be tried. There was then a good reason for a man to stand mute of malice. If he died without having been found guilty, his goods were not forfeited nor was his blood attainted. His family therefore did not suffer, as they would do if he were convicted. Treason was, however, not classed as felony, and if a man charged with that offence refused to plead it was taken *pro confesso* and judgment of death followed, as if he had pleaded guilty. Charles accordingly refused to plead, and, being condemned without evidence, his execution was the more startling, and the feeling of adherents in his favour was intensified.

After the Battle of Worcester, Hale was called upon to defend the Duke of Hamilton. In the report (2 Harg. S.T. 5) it is stated baldly that he argued "elaborately and at length."

He was indeed a supporter of constitutional monarchy, but the death of Charles I had made an obvious change. There was a Government in existence which was, in fact, administering the affairs of the country, and Hale felt himself free to take an engagement to obey the Commonwealth. His sympathy was with the existence of a monarch, but he did not shut his eyes to accomplished facts.

In 1651 he defended Christopher Lower, who had plotted to bring about a Restoration.

On 20th January, 1652, he was made a member of the committee to reform the laws. He took a leading part in its work which resulted in the almost complete abolition of the old feudal system of land owning. Tenure by knight service was abolished, and all land (other than copyhold) was made free and common socage, or, in modern language, freehold. The revival of the old incidents of feudal tenure by Charles I in his efforts to govern without a Parliament had turned the obsolete system from an anomaly into an instrument of tyranny, and the reform

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was welcomed by all land owners. The system of land owning was thereby unified and simplified, a change which was much needed in view of the great increase of dealings in land. Hale also procured that all pleadings should be written in English.

In 1654 he became both a judge of the Court of Common Pleas and a knight of the shire for Gloucestershire. A judge was not then disqualified for election to Parliament. In the political world he endeavoured to subordinate Oliver Cromwell's power to that of Parliament. He became a discriminating critic, and, although those in power did not altogether approve of criticism, his fairness and ability saved him from the fate of more pertinacious but less judicious objectors. He remained in his position as a judge and on 1st November, 1655, was placed on the Committee for Trade.

When Cromwell died, Hale realized that a Restoration was probable, and he set to work to further its advent. He refused to be reappointed to his judgeship, though invited to resume his seat on the Bench. On 27th January, 1659, he was elected member for Oxford and moved for a Restoration. He advocated a formal treaty along the lines of the abortive Treaty of Newport with Charles I, but the growing feeling in favour of a Restoration enabled more enthusiastic Royalists to set aside the suggestion. He sat for Gloucestershire in the Convention Parliament and was placed on committees for revising the Statute Law of the Commonwealth. He was thus enabled to procure the passing of new laws affirming most of the reforms which he had brought about under the Commonwealth.

On 22nd June, 1660, he became a Serjeant at Law. At that date only Serjeants were made judges, and Hale had already assumed the coif when he became a judge under the Commonwealth, but that was treated as a nullity.

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He was placed on the Commission for trying the Regicides, but did not take any noteworthy part in the trials. About this time he made an effort to bring Presbyterians within the Anglican Church, but failed. He was always a supporter of Comprehension, as this was called, and renewed his efforts on several subsequent occasions, notably in 1668 after Clarendon's fall.

A man like Hale, known to be a good judge, was not likely to be long without promotion. On 7th November, 1660, he was made Lord Chief Baron of the Court of Exchequer, and on 18th May, 1671, he succeeded Kelyng as Lord Chief Justice of the Court of King's Bench. From 1666 to 1672, in common with other judges, he sat on a statutory commission for settling disputes which might arise as a consequence of the Great Fire of London. In this work he was supreme ; he excelled the others in his knowledge of mathematics and architecture, and he was reputed to be the real arbiter of the commission. At the conclusion of its labours the grateful City Council had the portraits of Hale and his colleagues painted and hung in the Guildhall. In 1675 he several times tendered his resignation, as he had become a martyr to asthma. Eventually, on 20th February, 1676, he forced it personally upon the King, who accepted it with reluctance and granted him his salary for life, instead of during the King's pleasure as was then the custom. Hale's resignation did not prolong his life. He died on Christmas Day, 1676, and was buried in the parish where he was born sixty-seven years before. He had been twice married. His first wife, Anne Moore, was a grand-daughter of the celebrated lawyer, Sir Francis Moore. His second wife, Anne Bishop, was of comparatively humble origin. She was devotedly attached to him and nursed him tenderly in the decline of his health. Two children only survived him : the eldest of six daughters and the youngest of four sons.

The subject of this study rose to eminence at the Bar in

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a very anxious period. The code of forensic morals was not high. Many lawyers of standing habitually indulged both in *suppressio veri* and *suggestio falsi*, regarding them as legitimate methods of advocacy. Hale, both by precept and example, did much to raise the standard of morals. He never would indulge in advocate's tricks. If he were opposed to an inexperienced opponent, he would restate the argument made against him in the form in which he thought it should have been put ; whenever he could, he encouraged the novice by praising his arguments. He was not eloquent in the popular sense. He lacked fire ; but he was lucid and to the point. His learning was deep and exact, and naturally the judges relied upon such a man. To his colleagues at the Bar he was courteous and fair. To his clients he was honest and candid. He did not, as even Serjeant Maynard has been accused of doing, betray the cause of one client of little importance in order to stand well with the judge in other cases for more lucrative clients. He was implicitly trusted by all ; he never betrayed that trust.

He had a habit of refusing to appear in civil actions where he was not persuaded of the justice of the cause. This is not to be commended. The Bar as a profession offers its services to all litigants. Counsel supports his client's case within the limits prescribed by personal and professional honour. He is not the judge to decide the merits ; his function is to present his client's case. If counsel usurps the duties of the judge, then two results follow. First, men are deprived of that legal assistance to which they are entitled. Secondly, the fact that counsel is known only to accept cases in which he personally believes may work injustice to those whom he refuses. If it be known that he has refused instructions, an unfavourable impression is given before the case is heard. And so Hale sometimes found that he had caused injustice in several instances where he had made up his mind on the



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merits and found afterwards that he had rejected the case on insufficient grounds. He had a real desire to do justice, and often persuaded his clients to let him arbitrate instead of going to law and ruining themselves. He did not lack courage. It requires great nerve to accept the defence of persons who have come into opposition with the dominant party in times of strife. That he was able and conscientious in their defence is proved by the fact that they called upon him to defend them in case after case, though he was no fervent Royalist. That his honesty and fairness were beyond question can be judged by the fact that whoever was in power desired the benefit of his counsel, though he did not see eye to eye with them. If Hale had never ascended the Bench, he would have been a notable figure in the profession of the law.

A man of such a temperament is naturally more fitted for the position of a judge than for that of an advocate. He preferred rather to decide the issue than to present a case. As a judge, he was pre-eminent. He had a difficult task. Charles I had shown that judges held their office *durante placito*. If the King and the law did not agree, a judge who acted on the side of the law might find himself in his old age compelled to practise in competition with those who lately submitted to his decision. The Restoration had not given the judiciary security of tenure; a second Revolution was necessary to bring about that essential condition of judicial impartiality. The result was that judges, who in civil cases decided fairly and impartially, became timid and ineffectual in any trial where Court influence might have an interest. It must be remembered that Hale was succeeded by a Scroggs and a Jeffreys, men who by their life and conduct both on and off the Bench brought the judges of England into contempt. He rose supreme to all such temptations. It was perhaps his good fortune not to have to adjudicate upon any vital constitutional issue, though in such cases as did glance

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upon those matters he showed that he was ready to do his duty. He was not arrogant, nor did he impose his opinion upon his colleagues or the Bar. He had "no quick utterance, but often hesitant, and spoke with great reason." He often doubted and was never ashamed to alter his opinion. Thus in *Hopkins v. Robinson*, (2 Lev. 2), Hale inclined to accept the arguments for the defendant on a motion in arrest of judgment, but the Court adjourned consideration and eventually held in favour of the plaintiff. Again and again, cases before him were adjourned for the express purpose of consulting precedents. Counsel realized that, though he loved brevity and insisted upon relevant argument, he would fully and impartially consider their case after a courteous hearing. He had one peculiarity in that he encouraged counsel to correct his inaccuracies while summing up. Judges are apt to resent interruptions at such a time, and indeed the habit may be used as a cloak for rudeness. It is always a matter of anxiety for counsel whether to interpose or not ; frequently the judge by his next sentence adds the essential qualification which he seemed to have forgotten. With Hale, counsel need not hesitate. The judge was only anxious to do justice, and desired assistance with that object. He had his favourites. He was said to have been much swayed by Jeffreys in cases in which that remarkable man appeared before him. Jeffreys was, however, a lawyer of remarkable skill and personality, a fact which his infamy in other respects has somewhat obscured. Hale certainly did not like Saunders, a celebrated lawyer, whom he believed to be tricky and dishonest, though of such ability that he was retained by clients who loathed him.

In one case, arising out of the Great Fire, Saunders records that on a demurrer by a plaintiff to defendant's pleading which Saunders had settled, Hale would not hear his reason because he thought the defendant's pleading was drawn so as to trick the plaintiff, and "gave judgment

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for the plaintiff immediately (*quasi* in a passion)." Saunders adds that, in his opinion, Hale never considered whether the plea was good in law or not (*Walton v. Waterhouse*, 2 Wms. Saund. 422).

He was always compassionate. He had a practice of devoting one-tenth of his income to the poor. As Chief Justice he had many perquisites, which he used to alleviate the condition of prisoners. Indeed, he was in this matter one of the first judges to allow the claims of humanity. It is said that on one occasion he persuaded a jury to acquit a man who had stolen bread to save himself from starving. Later on, when reproving a Sheriff for his over-lavish entertainment, he was astonished to hear that his host was the starving man, who was seeking to show his gratitude. Shortly after his acquittal he had succeeded unexpectedly to a great inheritance and had thereby attained his present office.

This brings me to a celebrated case which is often cited as a blot upon Hale's character and career—I mean the trial of the Suffolk Witches, on 10th March, 1662. Two unfortunate women were charged before Hale with witchcraft, then a capital offence. In the course of the case Sir Thomas Browne gave evidence that witchcraft could be practised. During the trial a practical test was made by Lord Cornwallis, Sir Edmund Bacon and Serjeant Kelyng at the request of the judge. They took one of the bewitched children on one side and brought one of the accused to her so that, though the child knew that the witch was there, she could not see what was done. Then one of the bystanders touched the girl and she went off into the fit of excitement which was alleged to be caused by the witch touching her. This nearly led to an acquittal, and Serjeant Kelyng did not conceal his opinion that the prisoners ought to have been acquitted, but the child's parent interposed with a plausible suggestion, and the trial went on. Hale himself believed in witchcraft, and,

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in summing up to the jury, told them so. He did not attempt to influence the jury further, nor did he review the evidence, but directed the jury "strictly to observe the evidence ; and desired the great God in heaven to direct their hearts in this weighty thing that they had in hand : for to condemn the innocent and to let the guilty go free were both an abomination to the Lord." The jury convicted, and Hale took no steps, as he might have done if he desired mercy, to stay the execution ; and the women were duly hanged. He has been much criticized, but it cannot be denied that the law affirmed the existence of witchcraft and made it an offence, and that Hale himself believed in witchcraft. Criticism which ignores these factors is valueless. He ought, however, to have directed the jury as to the facts of the practical test and their bearing on the prisoners' guilt. It is said that he was afraid of an acquittal or a pardon lest it should give countenance to a disbelief in witchcraft, which was in his mind tantamount to disbelief in Christianity. If that be so, then his short and insufficient summing up was singularly fair, for judges of that day were prone to express their views and to hound juries on to convictions. On the following Sunday, he wrote a "Meditation" concerning the mercy of God in preserving us from "the malice and power of Evil Angels," in which he refers to the trial without disapprobation. The case is said to have led to the outburst of prosecutions for witchcraft in New England which occurred about this time. The last conviction for this offence in England was at Hertford in 1712, but the prisoner was pardoned. In 1736 the statutes against witchcraft were repealed and the pretence to exercise occult arts was placed on its present footing of petty cheating.

Hale was not a believer in the system that a jury ought to find the facts in accordance with the judge's direction. The old system of upsetting a verdict was a re-trial before

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a jury of attain, but in his day judges were apt to treat a verdict contrary to their view of what the facts were as misconduct on the jurors' part and to fine them for their contempt. This practice was declared illegal in *Bushell's Case*, a decision of Hale's friend Vaughan ; but before then Hale as Chief Baron had stayed process on fines imposed on a jury by the Common Serjeant with a view to their remission. The Attorney General objected and was visibly annoyed, but Hale and his colleagues were firm. He overruled an objection made by the Recorder of London that the Court had no jurisdiction because these fines belonged to the City. The matter was adjourned, and proceedings for *habeas corpus* were taken in the Court of King's Bench, but the jurors were not released until the fines were paid. (*Wagstaff's Case*, (1665) Harl. 409.)

It is not easy to estimate from the reports the value of Hale's judgments. The reports of his day were respectable, but most of them had no great reputation, and they did not profess to give the judge's actual words. One gathers from their perusal that the Chief Justice's presence did not deter the other judges from taking decided lines or from dissenting. He was clearly not anxious to decide cases out of hand, and over and over again adjourned them for further consideration. This casiness and hesitation were not signs of incapacity. When he had made up his mind it was upon full and ripe consideration and was unmistakable. The Court of Exchequer had an equitable jurisdiction, and Hale's decisions when Chief Baron in matters of equity were received with great respect. He was often consulted by the Lord Chancellor, and Finch is said to have relied upon him a great deal. As Finch was the Chancellor who made the first marked practice of following precedents, Hale had some influence in the framing of equity as a settled system of law. Up to Charles II, equity, in Selden's phrase, varied with "the length

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of the Chancellor's foot," and it was not till Lord Eldon that the Chancellor consistently followed precedents.

It is perhaps difficult in these times to realize what an achievement it was for Hale to act with honesty and fairness in his judicial work. Even men of great position then, and later, were open to corrupt influences, and judges were only gradually attaining that standard of rectitude which now renders impartiality a mere matter of avoiding personal prejudice. It is more difficult to understand how a man could rise so high in those troublous self-seeking times when his only assets were learning, ability and honesty. For one who was not a partisan to gain the confidence of the zealots, not of one side but of both, proves conclusively that he was an exceptional man. He could be trusted when no one knew in whom else to place their confidence.

It remains to deal with his writings. He published nothing of great importance on legal matters during his lifetime. An opinion he wrote upon the election of the Mayor, Aldermen and Councillors of London was printed in 1650. He brought out an edition of Rolle's *Abridgment* in 1668, but anonymously. He published several other works on scientific topics, but in those days curiosity in matters scientific was more pronounced than accuracy and method in scientific investigation. Hale was not in advance of his age and his scientific works are of no value. The two he published were *The Gravitation of Fluid Bodies* (1673) and *Observations on the Torricellian Experiments* (1674). They serve to emphasize the fact that Hale was not a man who shut his eyes to everything but law. He had an interest in all things that concern mankind, and his mind was cultured. His knowledge of Roman law and philosophy was of immense advantage to him in his legal writings, and his association with Selden and his friends must have been of the greatest service to him. He wrote much upon a variety of topics, but most of his writings

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were in manuscript at his death. He directed in his will that nothing should be published except those treatises which he had destined for publication in his lifetime. At his death, but without his sanction, were printed his *Contemplations Moral and Divine*, which throw light upon his character and the working of his mind. In 1677 there came *The Life and Death of Pomponius Atticus*, a celebrated Roman lawyer, whose biography had been written by Cornelius Nepos. Atticus was one of Hale's heroes and his career had a great influence upon him.

Many of Hale's legal writings have been published. *The Pleas of the Crown* (1678) is a brief account of criminal law, which had remained unfinished. Only one part, dealing with capital offences, was complete. The second and third parts, relating respectively to procedure on the trial of capital offences and to non-capital offences, were never finished. Opinions differ as to its value, but it is certain that for many years it was in constant use by practitioners who needed authoritative assistance, and at the present time any case which calls for the citation of former authorities will see Hale cited as one of the chief and most important sources. Indeed, it is rarely consulted in vain. *The Jurisdiction of the House of Lords* (1796) was in a more advanced state. It only needed the author's final revision. Many of his writings upon constitutional and other branches of law have been collected in *Tracts relating to the Law of England*. His *History of the Common Law* (1713) was a sketch and never passed for publication. It shows that the author had a clear view of the law as a whole and a wide and accurate knowledge of the authorities. Maitland was not greatly impressed with the merits of Hale's works, but Professor Houldsworth has more recently expressed the view that Hale might have written that account of the Common Law which Maitland said would be one of the great books of the world. Many of his writings are still in manuscript in the MSS. at Lincoln's Inn, but

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what we have is sufficient to establish Hale's position in the succession from Coke to Blackstone.

Coke, essentially the fighting advocate, used his law as a weapon. His writings are for practical use, and, like many another advocate, he often uses information which he imperfectly assimilated and, therefore, wrongly estimated. As I have pointed out elsewhere, Coke was a man who gathered the legal knowledge of the Middle Ages and transformed it into a living system convenient for the future development of the country. Hale had not to do this work over again. The Abridgments and the Reports had, by his day, provided the working tools of a practising lawyer. There was available a body of law stated in current language by contemporary judges. Hale, with judicial mind and inquiring culture, was the first of the modern commentators on English law. The age did not as yet enable him to disregard the only public he could have, those who followed the law or engaged in the legal and constitutional controversies of the day. The method and arrangements of his subject were still dictated by the practical convenience of the professional lawyer, but his knowledge of Roman law and his philosophic studies equipped him to plan afresh in such a way that, when Blackstone arose, he was able to transmute the laws of England into a systematic "exposition" arranged on a plan which admitted a logical division while it indulged the demands of practice. Nevertheless, Hale was still living in the age when men could and did search the authorities, not by way of antiquarian research, but for the solution of existing problems. He read and considered them for himself and embodied them in writings which reflect the matured opinions of a richly endowed and judicial mind.



## “JUDGE” JEFFREYS

THAT one of the judges of England who has become a legendary figure, known to all by the title of his office, became so known because he was execrated by his countrymen (who knew him well), as a supremely unjust judge. Ever since the Bloody Assize of August, 1685, Jeffreys has been held up as the most brutal and truculent judge who ever tried a case in this country. It is now possible to examine his career afresh, and to see how far Charles II may be blamed for selecting as his Lord Chief Justice, and James II for promoting to the Woolsack, a man who, in popular estimation, owed these favours to the ferocity with which he brutally executed commands which his ignorance prevented him from perceiving to be illegal. The case against Jeffreys has, in fact, been overstated. Careless as was Charles II, obstinate and wrong-headed as was his brother, neither was such a fool as to use and promote one who was not capable of performing the duties of his office. In that venal age, many competed for the rewards of compliance, but Jeffreys outdistanced all his competitors at the Bar. There must, on the whole, have been something quite exceptional about his ability or he would neither have risen so fast nor have been hated so heartily.

His career was meteoric. From his call to the Bar in 1668 to his death in 1689 not quite twenty-one years intervened. In a bare score of years he had contrived to become the foremost advocate of his day ; to achieve high offices ; to hold the same for five years ; and yet to die before he was forty-one, an age at which most barristers are emerging from obscurity. Such a record is convincing.



THE RT. HON. GEORGE, BARON JEFFREYS OF WEM  
LORD HIGH CHANCELLOR.

From a portrait in the National Portrait Gallery



## *“Judge” Jeffreys*

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Measured by any standards, he was a man of consummate ability. It remains to discuss why, none the less, he has survived in history as bad lawyer, bad judge and bad man. One reason is obvious. He adhered to the losing side, but that is not enough. The fact is that throughout his life he outraged decency. He carried out his tasks with a cold, yet blatant, brutality in which he seemed to delight. He mocked and jeered at victims unable to retaliate, and debased his vigour and ability to the destruction of English liberty. The very fact that he was a great advocate tended, as it always does, to depreciate unduly his knowledge of law, and estimates of his learning are inevitably damnatory when confined, as they usually are, to those harangues in which, from the Bench, he led the prosecution against those who resisted the King's administration. Others on the Bench were as bad or worse, but such was his pre-eminence that he has attracted to himself the total odium which should be shared by all the venal lawyers who made themselves the supple instruments of tyranny.

He had great natural advantages. Of good, though undistinguished, parentage, blessed with intelligence, good looks, a loud and commanding voice, an overpowering force of character, a genius for intrigue and bitter repartee, he descended, nevertheless, to look for clients by hobnobbing in ale-houses with disreputable attorneys and their clerks. It was soon found that he had wonderful insight into the real vitals of a case and a natural command of the art of cross-examination, which would be remarkable even in these days, and must have seemed miraculous in his own when that art was little studied or understood. He made good by outstanding merit the early start which he owed to pothouse conviviality. Realizing, quickly enough, that the young, inexperienced lawyer must wait years before he will be entrusted with “heavy” cases demanding ripe judgment or great learning, he devoted himself to the criminal courts and to the small civil causes

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of the City tribunals. He made good in this business very quickly, and was, before long, noted as the most promising advocate of the day. He soon was able to follow the usual course of attending the Courts in Westminster Hall ; but he went there as a man in practice, not as a looker-on. His rapid and comprehensive grasp of facts enabled him to exhibit mastery ; and so vivid was his intuition that he made it a substitute for sound learning. He thereby gained the favour of Sir Matthew Hale, who was too upright a man and too able and experienced a lawyer to be deceived in a matter of ability. Indeed, the Chief Justice's notorious hatred of advocates' tricks and chicanery is sufficient proof that Jeffreys could fight and win cases by clean, straight, powerful advocacy. His early fame in the City led him to become an adherent of the Opposition. Ambition alone impelled him to change his politics. He became pervert of his own free will, not induced by offers of reward, rather bribing his way to the Royal presence. Charles, who was tolerant of morals in others, perceived his weak points. The rising advocate, his Majesty observed, had no principles, and his habits were a scandal. It was to the Duke of York, in these circumstances, that he owed his promotion. On the Bench, he showed neither decency nor restraint. He acted from the judgment seat not merely as prosecutor, which in itself would have been a grave fault, but as a persecutor glorying in the misfortunes of the prisoner, hounding him to predetermined condemnation with insult and flout. He could not gain respect. Yet he was too able and too dangerous to be dismissed with contempt. Ferociously hating, he was ferociously hated. The lawyer doubted his learning and envied his promotion ; the layman was struck by his naked and insolent partiality. All condemned his notorious excesses : yet he was by nature enamoured of joviality and social intercourse, preferring, it must be made plain, to enjoy them in their coarsest

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settings. He was capable, too, strangely enough, of great generosity. It may well be that his attitude towards political offenders was calculated. With his supreme command of forensic tactics, he must have realized that once the King determined to flout Parliamentary government he must inevitably cow the people into subjection.

If the policy were to succeed, "Go on or be damned" would have been his honest advice to the Royal Patron. The premature rebellion of Monmouth and its early failure found the nation divided and left them stunned. He aimed with calculation at a paralysis of terror, and succeeded in producing a cold and sickly horror. He was then at the height of his power and must have realized that he ran incalculable risks. Others might be forgiven, but, as he learned from his attempts at understandings, he had sinned beyond redemption. So he spread every sail to gales of malevolent violence, advising and seconding with force and insult the policy which James had substituted for his brother's more cynical and more successful manœuvres. But, as the inevitable catastrophe approached, even Jeffreys became unnerved. His excesses, and his consequent infirmities, broke down his bodily powers, and when James fled his Lord Chancellor took to ignoble concealment, from which he was dragged a pitiable and abject wretch, who spent his few remaining months grateful for the prison which protected him from the vengeance of the people, and mumbling petitions for mercy at the steps of the new Throne.

But there were other aspects of his judicial career that must command attention. Even as Lord Chief Justice, most of his time was spent in judicial work which did not touch party questions, and most of his duties as Chancellor were remote from political strife. In that sphere he did good, useful work without passion or ill-will—a fact which, perhaps, may reinforce the suggestion that his

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ferocity in Crown prosecutions was a deliberate pose with a deliberate object, the inspiring of terror. He would have understood very well the reasoning of the Prussian philosopher. In his ordinary work, his temper, which grew worse and worse, was mostly vented at the expense of personal enemies or sycophantic friends, or else reserved for those whose misdeeds merited condign punishment. For seventeen years he held judicial office, and only in one class of case was his impartiality and uprightness impugned. We may follow these generalizations by a slightly more particular sketch.

George, first Baron Jeffreys of Wem, in the county of Salop, was born in 1648 at Acton House, near Wrexham, the sixth son of John and Margaret Jeffreys. The Jeffreys came of good stock. They claimed descent from Tudor Trevor, Earl of Hereford, and George's mother was a knight's daughter. His parents led a quiet, uneventful existence, and nothing in their lives gave promise of their son's unusual career. He was educated at three schools, Shrewsbury, St. Paul's—where he is said to have been a diligent student of classics—and, in 1661, Westminster, where the great Dr. Busby was Head. He early resolved to go to the Bar in spite, it is said, of his father's dissuasion ; for the latter had a strange presentiment that his son would thereby come to a disgraceful end. In 1662 he went up to Trinity College, Cambridge, but did not remain long, entering on 19th May, 1663, as a student of the Inner Temple. Like Holt at the sister University, he came down without a degree. He was called to the Bar on 22nd November, 1668, after an unusually short period as a student. He first practised in the City Courts and at the Old Bailey and Middlesex Sessions. He at once made his mark and gained a large practice on his merits. He must have attracted attention at his Inn by his abilities, for in 1669 he was one of two members of the Inn sent by the Reader to dissuade the Lord Mayor from attending

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the Reader's Feast with his mace and attendants, an assertion of authority over the Temple which has always been denied, and was on such an occasion certain to cause a riot. Jeffreys acted as spokesman, but was unable to make the Mayor see reason. His Lordship attended with his symbols of authority, and was so fiercely attacked by the younger members of the Inn that he had to take refuge. The riot was so serious that the military police were called out, and the authorities were seriously perturbed.

At this time there was an Alderman of the City named John Jeffreys, who, though no relative, took a great fancy to the able young lawyer, and supported him with such success that, on 17th March, 1671, he was elected Common Serjeant, the second judge of the City, at the unprecedentedly early age of twenty-three. He was encouraged by this promotion to seek his fortunes in the superior Courts at Westminster Hall, and it is said that by his skilful handling of cases he completely captured the ear of Lord Chief Justice Hale, though his enemies (I think unplausibly) attributed the judge's favour to judicious entertaining.

So far, he had associated with the popular party, but he appears to have decided that the Court offered more opportunity for advancement, and he began to attend Levees. It is said that he owed his introduction there to Chiffinch, the King's notorious servant, who was not above accepting a bribe for the service. The manners which had captured the affections of attorneys' clerks were not pleasing to Charles, who, with all his faults, expected among his graver servants a standard of decorum to which Jeffreys never attained. The King, in fact, never took him into favour. Indeed, His Majesty said that Jeffreys had “no knowledge, no sense, no manners and more impudence than ten carted street walkers.” He owed, as we have seen, his advance to the favour of the Duke of York, whose Solicitor General he became in 1677, the



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year in which he was knighted. In 1679 he made further progress. He was elected Recorder of London, and was made a Bencher of the Inner Temple. He also purchased Bulstrode, an estate in Buckinghamshire, where, in August, Charles II dined with him.

It appears from 41 L. Q. R. 71 that Jeffreys, desiring to become Recorder of London, soon after his first wife's death laid siege to Ann, widow of Sir John Jones and daughter of Alderman Sir Thomas Bludworth, M.P. for Southwark, Lord Mayor 1666. The manœuvre was obvious, and the lady's reputation not quite as unspotted as it might have been. Hence gossip. He married on 10th June, 1679. A daughter was born on 10th February, 1680, and further gossip exercised its mind on the possibilities of the child's paternity—eight months only having elapsed. A lampoon or so was issued, and even was mentioned in Court. He said to a woman witness, "You are very quick in your answers," and she replied, "As quick as I am, Sir George, I was not as quick as your lady."

For some reason or other the legend got about that Jeffreys married again within three months of his first wife's death. The article establishes that sixteen months had elapsed.

He was one of the counsel for the Crown in the series of prosecutions arising out of the Popish Plot, commencing with the trial of Green and others on the charge of murdering Sir Edmundbury Godfrey, one of the most remarkable mysteries in the history of crime. In 1680 came further promotion. Favoured, so gossip suggested, by the Duchess of Portsmouth, he was on 30th April, 1680, made Chief Justice of Chester, and in May he was raised to the rank of Serjeant at Law. His methods of advocacy had in the meantime attracted unfavourable notice, and at Kingston Assizes in July of that year he was severely reprimanded for his violence by Mr. Baron Weston.

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He had taken a prominent part in supporting the Duke of York against the attempts to exclude him which were made in Parliament, and criticisms were in consequence passed on his conduct as Chief Justice of Chester. Booth, afterwards Lord Delamere, denounced his judicial conduct as unseemly, declaring that he behaved like a “Jack Pudding.” One may, to some extent, discount this criticism. He had sat on the Bench at the Old Bailey for years without incurring any blame, and the comments coincided with his opposition to the dominant party in the Commons. Nevertheless, both his temper and self-control had deteriorated with the growth of his drunken habits, and he was rapidly losing caste. On 13th November, 1680, the Commons took action. He was reprimanded on his knees by the Speaker, Sir William Wynne, an indignity which he never forgot, and his resentment was alleged to be the cause why Sir William afterwards went over to the Court party, as the only way to avoid Jeffreys’ revenge. The Commons petitioned the King to deprive him of his judicial office. Charles was disposed to ignore the request, but Jeffreys resigned his Recorder-ship, being, as Charles, in rather a good expression, commented, not “Parliament proof.” Soon afterwards he was elected Chairman of Middlesex Sessions, and attempted to purge the Grand Jury panel, but in vain. This was really a political move, as most political offenders were then tried on indictments presented by that Grand Jury. In 1681 he prosecuted Fitzharris, Archbishop Plunket, and College for high treason, and on 17th November of that year he was created a baronet.

He was now taking an active part in promoting the *Quo Warranto* proceedings against the City. Not only was the City the centre of opposition to the Crown, but control of the Corporation meant control over the elections to Parliament. If the Crown could recharter all the recalcitrant boroughs, then a Parliamentary majority was

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assured. He did not appear in the proceedings. Such were his services that Charles gave up resistance to his brother's pressure, and on 29th September, 1683, reluctantly appointed Jeffreys Chief Justice of the Court of King's Bench. He was then but thirty-five. Almost his last case at the Bar was the trial of William, Lord Russell, in which he made the final speech for the prosecution, a remarkable effort, though Bishop Burnet did say that it was "only an insolent declamation, full of fury." On 4th October he was sworn of the Privy Council. Soon after he was appointed he presided over the trial of Algernon Sidney for treason, and next year over the trial of Titus Oates. In 1684 he went on the Northern Circuit with the mission of reforming the boroughs. By one means or another he persuaded a number of the towns to surrender their charters, and these were reincorporated as close boroughs under Royal control.

Naturally, the accession of James II on 2nd February, 1685, did him no harm, and he acted throughout the new King's short reign as adviser. He was made a member of the Committee on Claims. At the beginning he gave the bad advice that James should continue to collect the customs as if Parliament had duly granted them. On 15th May he was raised to the peerage as Baron Jeffreys of Wem, the first Chief Justice to be made a peer. A fortnight later he tried Richard Baxter, the eminent Non-conformist Divine, for a criminal libel on the Church of England in his book, *Paraphrase of the New Testament*. Sir William Wynne, who appeared for the defence, declined to make a speech before him.

Upon the suppression of Monmouth's Rebellion, Jeffreys, with four other judges, went on circuit on the Western Assizes, where the chief business was to try those prisoners who had not fallen victims to the King's troops. The proceedings on this circuit are not well reported, and in such accounts as exist the whole odium of the

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proceedings is thrown upon the Chief Justice. There can be little doubt that the general policy was decided by James, to whom Jeffreys reported immediately on his return. All five judges must have taken part in some of these trials, and probably no one judge sat alone to try any of them. Jeffreys was believed by some to have accepted money from prisoners and their relatives to show them mercy. This is quite possible, as, knowing the policy to be pursued, he could easily show mercy by selecting those who were not to be hanged. It was then always possible for a judge to prevent a criminal from obtaining pardon by marking him for immediate execution. The Crown counsel was Pollexfen, who had defended Russell and others, and afterwards regained popular favour by defending the Seven Bishops. Upon Jeffreys has fallen all the odium of the Bloody Assizes. The trials began with that of the Lady Alice Lisle, widow of one of Cromwell's Commissioners of the Great Seal. She was the only prisoner from Hampshire on a charge of treason, and he made sure of a conviction there. The executions were not so many as is imagined. Six towns were visited between 25th August and 3rd October, 1685. At the Assizes at these places one thousand three hundred and eighty-one were convicted or pleaded guilty. At Wells and Taunton the judges stayed their hands in order to consult the King, who took a personal interest throughout the proceedings. By the end of the Assizes sixty-five had been executed, and this number had only been increased by twenty-two in November. The actual number of executions is not known, but one hundred and fifty is probably an over-estimate. Sparing the lives of the others was not really mercy. The courtiers struggled with one another for the disposal of the prisoners, who were sold into servitude in the West Indies and American plantations, and thus underwent hardships and privations which would make hanging seem almost humane. The treatment of

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these unfortunates, duped and deserted, added not a little to the resentment felt by most Englishmen, who objected to James' policy and actions, but were not prepared to place Monmouth on the throne.

At Taunton a clergyman stood up in the Court and remonstrated with the judges. Jeffreys listened attentively and made no comment, but on his return to London presented the daring man to a canonry at Bristol, which is a Lord Chancellor's living.

As soon as he returned, he received the Great Seal. He was not a success in the Lords where the majority were Whigs, and when, in November, 1685, the new Lord Chancellor spoke in favour of the dispensing power, his methods and manners aroused so much resentment that he was forced to apologize. He was at the same time at the height of unpopularity throughout the country. At the Bristol by-election in 1686 the candidate he supported did not dare show himself, and his supporters, when they were seen, were chased through the streets. He made from time to time attempts to establish relations with the opposition as an insurance against trouble, but was not successful. In January, 1686, he presided over the trial of Lord Delamere, but, in spite of the former attacks of the prisoner upon him, he behaved impartially, and advised the Lords to acquit.

In 1686 he was party to the illegal renewal of the High Court of Commission, and in July, 1687, presided over the proceedings against Magdalen College, Oxford, consequent upon their refusal to admit a Jesuit priest. He was an essential member of the Court, and took a very active part in coercing the Church, although he was a Protestant, and was always counted as such, even when Romanizing influences were at their height.

During 1686 he was called to settle the great dispute between the Inner and Middle Temples, known as the "Battle of the Organs." The two most noted makers

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of this instrument in England then were Father Bernhardt Schmidt and René Harris. Each built an organ which was set up in the Church, and various trials were held, so that the whole musical world became interested. The Middle Temple favoured Schmidt, and the Inner, Harris. Eventually, the Middle Temple suggested in 1685 that Lord Guildford, the Lord Chancellor, should settle the dispute. He was known to be a lover of music, but he was in bad health, and died. The Inner Temple favoured a decision by skilled musicians not connected with either House, and refused to assent even when, by the succession of Jeffreys to Guildford, an old member of their Inn was substituted for a former member of the Middle Temple. Eventually, the Inner Temple gave way, and during 1687 the Chancellor decided in favour of Schmidt, whose organ has been in the Temple Church ever since. In that year the Inner Temple had Jeffreys' portrait painted, and hung in their Hall, but in 1697 they gave it to his son.

Political troubles continued without ceasing, and the Bench was continually being tampered with. Though there were only twelve Common Law judges altogether, no less than twelve were dismissed during the three years of this reign, and one or more who were appointed were men of suspected character.

Jeffreys advised that the Seven Bishops should be put on their trial, but to save his face he secretly sent messages to them.

In July, 1688, a mandate was sent to Oxford to elect him as Chancellor on the death of the first Duke of Ormonde. The University had got to know of the design, and, with commendable speed, evaded the plan by electing the second Duke to succeed his father as Chancellor, and the mandate arrived too late. After the landing of William, and the universal failure to support James, Jeffreys remained his adviser. On 2nd October the forfeited charter was returned to the City, but the concession came too late.

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Early in November he advised the King to call a free Parliament, and on the 28th of that month made his last appearance in Westminster Hall to announce to the Bench and Bar that he had been ordered to seal the writs for a free election. He had been sitting in the Court of Chancery, and his last case reported in *Vernon* is dated 24th November, though the Master of the Rolls sat on into December. On the 8th December he surrendered the Great Seal after hearing several applications, and he and James parted, never to meet again.

He disguised himself as a seaman and went on board a ship in the Port of London, but on 12th December he went on shore at Wapping to drink at the "Red Cow" in Anchor and Hope Alley, where he was recognized by an attorney upon whose conduct he had occasion to make severe animadversion. He was sent to the Tower, where he remained, in a fever of apprehension lest he should fall into the hands of the people. He is said to have petitioned William for pardon. There was, however, no need to decide his fate. He was a dying man, and expired on 18th April, 1689, in the 41st year of his age, from an illness caused or aggravated by his habits. He was buried at the Tower next to Monmouth, but in 1693 his body was removed and re-buried in the City at St. Mary's, Aldermanbury. He was succeeded by his son, who died without issue, and the title became extinct.

Jeffreys was twice married. The first marriage reflects great credit on him, if the story is true. He was at the time courting a City heiress, whose father, objecting to him, and discovering that her companion was receiving letters meant for his daughter, dismissed the employee summarily. Jeffreys, finding that by his action he had ruined the young lady, married her, though she had nothing and he was fortune hunting. She was Sarah, daughter of the Rev. T. Neesham, and he married her on 23rd May, 1667. They had four sons and two daughters,

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most of whom died young. She died on 14th February, 1678. In June, 1679, he married Ann, the daughter of Sir T. Bludworth. Bludworth was Lord Mayor during the Great Fire, and made a fool of himself then and on other occasions. By his second marriage Jeffreys had six more children, four daughters and two sons, but only one of these survived him.

Jeffreys' career was curiously duplicated. During practically the whole of his forensic career he held judicial office. Within three years from his call, he became Common Serjeant, and afterwards Recorder of London, in which offices he exercised important civil and criminal jurisdiction. While Recorder he became Chief Justice of Chester, an appointment which he held until he became Lord Chief Justice in 1683, when, for the first time since 1671, he could not be both judge and counsel. He made up for the deprivation by exercising advocacy from the Bench; indeed, the most characteristic examples of his skill in cross-examination are to be derived from the period when he was no longer appearing as counsel.

The early cases in which he appeared at the Bar were too unimportant to deserve preservation. In the reports of the State Trials in which he was engaged as counsel it is not easy to determine the exact part he played. The judges were almost invariably partisans. It was customary to brief both Law Officers and several other counsel, and the proceedings were very irregular according to modern ideas. All the judges and counsel frequently asked questions one after another, whether the particular phase was supposed to be examination or cross-examination. This may be affirmed with confidence: that, whenever things approached a crisis, whether in the examination of a witness or the conduct of the whole case, Jeffreys is to be found intervening, even if he intervened at no other stage. In a number of instances he made the final speech



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for the Crown. There can be no doubt that he was regarded as the most powerful advocate at the Bar. In the *Duke of York v. Pilkington*, (1682, 2 Show. K.B. 246), an action of *scandalum magnatum* for saying "He has burned the City and is now come to cut our throats," he secured a verdict for £100,000.

In 1683 Sir Patience Ward, a former Lord Mayor, was indicted for perjury in the Duke of York's case. There was much disorder and noise in Court, but one witness remarked, "Sir George, your voice being much louder than other men's, I hear you plainly." Jeffreys spoke last for the prosecution, observing that he did so because the Solicitor General had been called into another Court.

He was not regarded as a good lawyer. Men who are good advocates often find their legal abilities over-discounted. It must not be forgotten that in those days of formality no lawyer, however his practice may have been confined to issues of fact, could possibly succeed without a technical equipment which would, in our less formal days, ensure a reputation as a sound lawyer. Yet there can be no doubt that contemporaries regarded him as one whose knowledge of law was less than that of any other prominent counsel of the day. The comments of Evelyn are decisive. The diarist mentions that Jeffreys entertained him and always used him well. Yet, when he was made Lord Chief Justice, Evelyn records "Sir George Jeffreys was advanced, reputed to be most ignorant but most daring." On his advancement to be Lord Chancellor, "He . . . is of an assured and undaunted spirit, and has served the Court interest on all the hardest occasions, is of nature cruel and a slave of the Court."

There seems little ground to believe that, in his capacity as Common Serjeant or as Recorder, there were any reasons to criticize him as being markedly inferior to or more

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vindictive than others. Indeed, the case of Giles, in which Holt prosecuted before Jeffreys as Recorder, has been mentioned by Fitzjames Stephen with praise. The criticisms of his demeanour as Chief Justice of Chester coincide with his political activities and may be discounted as coming from political opponents. Yet there is some reason to think that disease and dissipation did cause a marked and progressive depreciation of his power of self-control ; and he became unable to refrain from outbursts of ungovernable temper.

His decisions were characterized by common sense, and he certainly had the advantage of being assisted by the arguments of able lawyers. Some examples may illustrate his ways of thought while Lord Chief Justice.

In *Austin v. Culpepper*, (2 Show. K.B. 313), the parties were concerned in a Chancery suit. For the purpose of casting discredit on the plaintiff, the defendant published a false order in Chancery. On the strength of this pretended order he published a picture of the plaintiff in the pillory with a defamatory inscription. The plaintiff brought an action for libel, and the jury awarded him £500 damages. The defendant sought to upset the verdict on the ground that the claim was for two matters, viz. the publishing of the false order and the publishing of the picture, and the jury had not distinguished between the two in their verdict. Jeffreys was not impressed. He said that the whole thing was but one whole complicated act, and upheld the verdict. In *King v. Pierce*, (2 Show. K.B. 327), he held that soap-boiling and such-like occupations, though lawful, were a nuisance if carried on to the annoyance of the neighbourhood. In *Jackson v. Rogers*, (2 Show. K.B. 327), he held that a common carrier who has room and is tendered the hire is liable to an action for damages if he refuses to accept goods. In the *King v. Danby*, (2 Show. K.B. 335), he expressed the opinion

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that if a peer be committed on impeachment he may, during prorogation or after dissolution, be bailed by the Court of King's Bench. *Rex v. Coney and O'Brien*, (Skin. 157), arose out of a duel. The prisoners pleaded the King's pardon, which mentioned the death but did not expressly call it murder. Holt argued that it was a bar to a prosecution for murder, and Jeffreys accepted his contention. In *Anon*, (Skin. 196), he held that a promise to marry was not within the Statute of Frauds, and, therefore, need not be in writing. In *Rosewell's Case* Jeffreys was inclined to the view that an innuendo was not permitted to explain the words alleged for the purpose of showing them to be treasonable. As the prisoner was pardoned, the point was not finally decided. In the course of the hearing the Lord Chief Justice expatiated on the hardship that in treason cases counsel could not defend the prisoner, but merely argue points of law, though they would give him every assistance on a "twopenny trespass." This hardship was remedied in the next reign. In *Roe v. Clarges*, (3 Mod. 25), he decided that it was actionable to call a Privy Councillor a Papist; and, as the law then stood, he was right; for no Roman Catholic could hold that office. In *Brason v. Dean*, (3 Mod. 39), he held that a penal statute was not retrospective. These cases have been taken from the various reports of his decisions, and, with the possible exception of *Danby's Case*, into which political considerations entered, and where the effects of prorogation and dissolution were not adequately examined, would be considered to be good law to-day.

When, however, one turns to the political trials another situation arises. Almost as soon as William, Lord Russell, had been condemned, largely by his advocacy, he presided over the trial of Algernon Sidney. The great point was whether a witness to one overt act of treason added to a witness to another overt act of the same class satisfied the requirement that two witnesses were necessary to convict

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of treason. He treated the point as too plain for discussion, and was, at any rate, supported by other cases where the same ruling had been given. During the trial of Braddon and Speke in 1684 for suborning witnesses to say that the Earl of Essex had been murdered in the Tower by his keepers, the Chief Justice stopped counsel from putting leading questions in cross-examination. He also stopped most material questions which tended to throw discredit on the Government. The dialogue is instructive :—

Mr. Wallop : I am here as counsel for Mr. Braddon, and I only ask questions as they are in my brief.

L.C.J. : But sir, if you have anything in your brief that reflects upon the Government, you ought not to vent it, nor shan't be permitted to vent it so long as I sit here.

Mr. W. : My Lord, with submission, I hope I never did, nor never shall, let any such thing come from me.

L.C.J. : Nay, be as angry or as pleased as you will. 'Tis all one to me. You shall not have liberty to broach your seditious tenets here.

And later on :—

Mr. W. : My Lord, zeal for the truth is a good zeal.

L.C.J. : It is so, but zeal for faction and sedition, I am sure, is bad zeal. I see nothing in all this cause but villainy and baseness.

In the trial of Titus Oates in 1685 for perjury he let himself go. From the Bench he led the prosecution, and the screen of impartial words did not hide the fact that his summing up was a speech for the prosecution. It was a skilful performance. He had acted as counsel in the cases in which prisoners had been condemned by his efforts, relying upon Oates' testimony. He had then expressed confidence in the man's veracity. His distinction between submissions made as counsel and evidence is a sound one, and carried him over the dangerous part of his summing up. But nothing could excuse passages such as this :—

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“The pretended infirmity of his body made him remove out of Court ; but the infirmity of his depraved mind, the blackness of his soul, the baseness of his actions, ought to be looked upon with such horror and detestation as to think him unworthy any longer to tread upon the face of God’s earth.” At the close he offered to procure drink for the jury before they retired, but they declined. No sooner had Oates been convicted than he was again tried for perjury in other cases. On this occasion, the Chief Justice, relying, no doubt, on the verdict already recorded, threw off all pretence and throughout assumed the prisoner’s guilt. One extract will suffice : “God deliver me from having the least stain of innocent blood imputed to me. And it is more to be lamented when we see that impudence which has brought that infamy upon our land continues with a brazen face denying all share.” The sentence was ferocious : one hundred thousand pounds fine, whipping, pillory every year on stated dates, and imprisonment for life. The sentence was, in addition to an award of £100,000 damages, made in 1684 in an action by the Duke against Oates for *scandalum magnatum*. Oates made default in defending the action, but, nevertheless, the Lord Chief Justice presided at the assessment of damages by the Sheriff’s jury. Oates succeeded in getting the sentence remitted by Statute under William and Mary, but never obtained a pardon, so as to make him capable of giving evidence again.

*Sir Thomas Armstrong’s Case*, (1684, 3 Mod. 47), was another instance of his political decisions. The prisoner had been outlawed for high treason. Under a Statute of Edward VI he would be entitled, if he liked to surrender himself to the Lord Chief Justice within a year of outlawry, to be tried for the treason alleged. Otherwise, as the law then stood, he would stand convicted, and the duty of the Court was limited to passing sentence. Armstrong was arrested at Leyden, and brought up for sentence. A

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year had not elapsed, and he offered to yield himself up in Court. The offer was rejected because he had not come voluntarily, but was brought up in custody, and he was sentenced and executed. Afterwards an attempt was made to cite this case to Lord Raymond, but he refused to allow it to be discussed or argued, so much did he abhor it.

Jeffreys had always been regarded as chiefly responsible for the Bloody Assizes. There can be no doubt that he gave full rein to his zeal for the King and to his bent for prosecuting criminals. He showed no mercy, and some of his humorous remarks froze the blood of the spectators. To remark to men who bore the name of Obadiah or some other Scriptural name that their godfathers had caused their death is hardly to be classed as humour, but as gloating over the unfortunate. But nearly all the prisoners were guilty. Even Alice Lisle was guilty if she knew that Hickes was a rebel ; and she was singularly obtuse if she did not. The barbarity lies in executing her, and the main responsibility for that lies upon James. Jeffreys' cross-examination of Dunne, Lady Alice Lisle's servant, would be a masterpiece but for the fact that the man was a poor liar, and Pollexfen could have done all that was necessary without help from the Bench. The judge's comments, as the cross-examination proceeded, were beyond all limit. Among the gems were :—"It seems that the 'Saints' have a certain charter for lying. They may lie and cant and deceive and rebel, and God Almighty takes no notice of it. . . . See how they can cant and snivel and lie and forswear themselves." "Oh hard the truth is to come out of a lying Presbyterian knave." "Hold the candle to his face, that we may see his brazen face." (A candle was held near the witness). "Truth never wants a subterfuge. It always loves to appear naked. It needs no enamel nor any covering, but lying and snivelling and canting and Hickesing always appear in masquerade."

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"There is not one of those lying, snivelling, canting Presbyterian rascals but one way or another had a hand in the later horrid conspiracy and rebellion, upon my conscience I do believe it, and would have been as deep in the actual rebellion had it any little success as that fellow Hickes. Their principles carry them to it. Presbytery has all manner of villainy in it. Nothing but Presbytery could lead that fellow Dunne to tell so many lies as he has here told. Show me a Presbyterian and I will engage to show a lying knave." "Thou art a strange prevaricating, shuffling, snivelling, lying rascal." "And why didst thou tell us so many lies, then? Jesu God, that we should live to see any such creatures among mankind. . . . Is this that that is called the Protestant religion, a thing so much boasted of and pretended to? We have heard a great deal of clamour against Popery and dispensations. What dispensation, pray, does the Protestant religion give for such practices as these? . . . It cannot but make all mankind to tremble and be filled with horror that such a wretched creature should live upon the earth." The last sentence embodies the verdict of his fellow countrymen upon Jeffreys himself.

The King was grateful and promoted him to the Woolsack. This meant that he ceased to preside at criminal trials, except when a peer was charged. His conduct at the trial of Lord Delamere has already been mentioned. His outbursts in favour of the King's illegal measures were thenceforth limited to the Court of High Commission. In the ordinary work of the Court of Chancery he gave satisfaction. The reports of this period are hardly of sufficient authority to determine the soundness of his decisions. It must also be remembered that, though Lord Nottingham had done much to reduce Equity to a system, the Chancellor was not yet bound to follow even his own rulings. That cases have not been followed is, therefore, not proof that they were wrong. Many deci-

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sions are clearly right. The rules of practice that he issued were reputed to be the best since Lord Bacon's. He certainly warred against abuses and did much to improve the administration of the Chancery. But, on the other hand, his vices were getting a firmer and more apparent hold upon him. He would come into Court hours after the appointed time with bleared bloodshot eyes and shaking hands, when the apprehensive people in Court began to await the moment when chance selected the victim of the Chancellor's temper, inflamed beyond control by disease and drink. To do him justice, though, he was usually incensed against the right persons, and, in matters apart from politics, was moved to wrath mainly by injustice, fraud and chicanery.

One of his earliest decisions was *Oldfield v. Oldfield*, (1 Vern. 336). The testator had by will given to his younger children £3,000 which was out on mortgage. He appointed his eldest son executor and provided that, if he did not pay over the sum, the lands going to him were to pass for the benefit of the younger children to raise the amount. The mortgagor brought a suit for redemption, and the Master in Chancery approved the money being invested in £1,000 bonds to Sir Robert Viner, Alderman Backwell and Meynell. When these gentlemen went bankrupt, an early and notable failure of bankers, a suit was instituted to enforce payment out of the eldest son's lands. The Lord Chancellor held that the money had been duly paid, and therefore the eldest son was not liable. The practice of investing suitors' money on private security was afterwards discontinued.

*Jevon v. Bush*, (1 Vern. 342), was also a trustee case. Lord Bellamont, having taken up arms for Charles, found it convenient in 1647 to leave England. Before doing so, he lent £600 on a recognisance in favour of Bush, the defendant, in trust for the plaintiff, then a child of two. Lord Bellamont died in Persia in 1654, and in that year



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Bush was persuaded to acknowledge satisfaction of the security. He was eighteen in 1647, and consequently was then twenty-five. When, years afterwards, the plaintiff claimed against him he objected that he was an infant at the time, and that the transaction was to protect Lord Bellamont's estate and not the plaintiff, and that he believed the widow had received the money. The Lord Chancellor held that an infant could be a trustee and that it was for the trustee to prove that he had carried out the trust; and so Bush was ordered to pay.

*Allen v. Arme*, (1 Vern. 365), arose on an attempt by a widow to upset a gift by her husband. Before he married her he was a childless widower and, happening to fall sick, he made a voluntary surrender of certain copyholds to the nephew of his first wife as a gift to him. He recovered, and married the plaintiff, by whom he had children. The Lord Chancellor held that this was not a case where Equity would interfere. Apparently, some years had elapsed between the gift and the donor's death, and he had been quite content not to try to recall the gift.

In *Vernon's Case*, (1 Vern. 370), he criticized the lavish grants of the Crown estates in a suit brought to revoke a letters patent granting away the Honour of Tutbury. There was apparently no fraud, but the Crown succeeded for reasons which are unconvincing. Jeffreys said he "could wish the Crown had not parted with so many flowers as it had already done, and then he was persuaded that there would not have been so many rebellions as there have been, and, though Colonel Vernon was an honest gentleman and of good quality, the Honour of Tutbury is of that vast extent and so many noblemen hold of it that it is not fitting for a person of his degree." It apparently was also not fitting that he should receive back the lands at Sheerness which he had granted to the King in part exchange, for no mention appears to have been made

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of it in the decree, but Colonel Vernon was afterwards paid for them.

*Jauncey v. Sealey*, (1 Vern. 397), is a decision that a will of personal estate, situate abroad, belonging to a testator dying abroad need not be proved here.

*Kildare v. Eustace*, (1 Vern. 405, 419) is an application of the maxim Equity acts *in personam*. In 1615 Lord Ellesmere had decided in the Earl of Oxford's case that if a trustee could be served in this country the Court of Chancery would enforce trusts abroad. When the present case first came on Jeffreys doubted whether he had jurisdiction, and Sir John Holt was brought in to argue that the Court could act. On hearing his argument, the other side conceded the point. Neither Jeffreys nor Holt appears to have referred to the Earl of Oxford's case, which is one of the leading cases in Equity.

In *Hunt v. Matthews*, (1 Vern. 408), he held that a widow might, on the eve of her remarriage, make provision for the benefit of her existing children without obtaining the consent of her prospective husband, to whom otherwise, as the law then stood, the property would have passed on marriage.

He sometimes acted without evidence where he knew the facts. He had on several occasions when Lord Chief Justice mentioned facts within his knowledge though not given in evidence. *Aspinall v. Case*, (1 Vern. 433), was an attempt by a beneficiary to upset his uncle's dispositions on the ground that the deceased was misled by Mr. Entwistle, his conveyancer. Jeffreys said, when delivering judgment, “Sir Gilbert has expressly given the surplus of the profits to the trustees, and I cannot take it from them; he might have given his estate to a fiddler for a song; and I know Sir Gilbert was in doubt which way to dispose of his estate, and that he had a personal kindness and friendship for some of the trustees, and no good opinion of the plaintiff.” *Bill v. Price*, (1 Vern. 467),

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is an illustration of the way Equity protected expectant heirs. The defendant was an "exchange man" who practised on young heirs, selling them goods at extravagant rates to be paid for fivefold on their father's death. He apparently mixed the transactions up, taking joint bonds for the debt of each from several expectant heirs, presumably on the basis that one or other was sure to pay. The Lord Chancellor divided the transactions up and ordered the bond to be delivered up on payment of what the plaintiff owed him alone and for his own use.

In *Capell v. Brewer*, (1 Vern. 469), he denounced an abuse whereby persons liable to account to the King were able to use the Crown's prerogative power of summary execution to collect their private debts. He said, "It is become common practice and a great oppression in the City that any accountant to the King shall sell wines on credit at an extravagant price, and when the man fails, an execution comes out of the Exchequer at the King's suit, and sweeps all away, so that all other just creditors are defeated and a bankruptcy rendered ineffectual." As, in this case, the creditor could pay the King without any payment from the debtor, he was ordered to refund the money with costs. The practice was afterwards altered to prevent this abuse.

*Att.-Gen. v. Ryder*, (2 Chan. Ca. 178), was a suit to forfeit to the King a legacy of £600 given for ejected ministers. Unfortunately, there was no decision, as the executor set up the defence that the bequest was afterwards revoked, a matter which the Lord Chancellor held to be triable only in an ecclesiastical court. *Phillips v. Vaughan*, (1 Vern. 336), was an attempt by a mortgagor to redeem a mortgage for the sum which the assignee had given to obtain a transfer. Jeffreys said, "This case has neither point nor edge, for there is no colour why, when the heir of the mortgagor comes to redeem the mortgage, he should not pay the whole that is due on the mortgage. If another

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man has met with a good bargain, there is no equity for the heir of the mortgagor to deprive him of the benefit of it and make an advantage thereof to himself."

*Carpenter v. Carpenter*, (1 Vern. 440). A common recovery suffered a fine levied by an equitable tenant in tail has the same result in equity as it does in law in the case of a legal estate.

*Trinity College, Cambridge, v. Browne*, (1 Vern. 441). On the death of the holder of an equitable estate in copyholds no heriot is due.

*Englefield v. Englefield*, (1 Vern. 443). Although a contingent remainder be destroyed by a legal conveyance, equity will give relief if the conveyance be obtained by fraud.

*Firebrass v. Brett*, (1 Vern. 489), arose on an application for an injunction to stay an action at law brought by defendant against the plaintiff for forcibly taking money from the defendant. Brett and Sir William Russell had dined with Sir Basil Firebrass at the latter's house. After dinner they won off Sir Basil £900, which Brett took away. He and his partner had only eight guineas between them when play began. Sir Basil, being "inflamed with wine," brought down a bag of guineas amounting to about £1,500. Brett won that. As he was going, Sir Basil and his servants took the bag of guineas away. After that Sir Basil prosecuted Brett for playing with false dice, but the jury acquitted, and Brett then sued Firebrass, who promptly moved for this injunction which he obtained until the hearing of the action for a perpetual injunction. The Lord Chancellor "thought the sum very exorbitant for a man to lose at play in one night, and if it were in his power he would prevent it," and he cited the case of Sir Cecil Raleigh and Sir John Staples in Hale's time about a wager on a foot-race and mentioned that the Chief Justice then had said that "these great wagers proceeded from avarice and were founded in corruption."

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In *Fotherby v. Hartridge*, (2 Vern. 21), he held that forty-four years after death the Court would presume that legacies had been paid.

*Child v. Danbridge*, (2 Vern. 71), arose on a composition by a tradesman. All the creditors had agreed, but one made a secret arrangement to receive his debt in full. The Lord Chancellor held that on discovery of this the others might repudiate the composition.

The last case reported in *Vernon* was heard by him on 24th November, 1688. It was *Gomer v. Hollingshead*, (2 Vern. 70). A Master in Chancery had allowed money in Court to be invested on a security which turned out to be insufficient. There being no allegation of bribery or corruption, he dismissed the complaint.

The cases I have cited are a selection only of the many that he determined, but they are sufficient to justify the contention that, both at law and in equity, his conclusions do not differ markedly from those of judges against whose legal knowledge no criticism has been urged. They do not show a grasp of principle such as enabled judges like Coke, Hale, Holt, Mansfield and others to determine the broad road of legal principle. They are rather decisions on the facts of the case, and prove that he was unusually competent to see the real point and to decide it properly and fairly. What fatally ruined his reputation was the fact that he openly allowed political considerations to have full play, without even troubling to hide his want of impartiality. He was rightly regarded as a tool, powerful and acting with zeal and zest, but, still, always obeying orders. As Chancellor, he was one of the King's chief advisers, and must bear a full share of responsibility for the disastrous policy which caused James' downfall. The Court of High Commission was one of the main causes of the Revolution. Jeffreys advised its creation. He could not have failed to realize that it was illegal, except on the most strained view of the prerogative. Yet he

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was the chief, and the only indispensable, member. Though a Protestant, he gave every assistance to the King's forcing the Roman Catholics on the Universities contrary to the law. His behaviour when Cambridge University was arraigned for failing to confer a degree on a monk, contrary to the law, was disgraceful. It passed all limits in the proceedings against Magdalen College, Oxford, for refusing to elect the Jesuit Farmer as its head. He met with some rebuffs. On one occasion he encouraged one of the Fellows, Dr. Fairfax, thinking the latter was about to submit. He, however, was mistaken and found that he had given occasion for a protest on legal grounds and angrily remarked that the protester was a Doctor of Divinity not a Doctor of Laws ; and when the Doctor went on to inquire by what commission or authority the Court sat, Jeffreys retorted, “Pray, what commission have you to be so impudent in Court ? This man ought to be kept in a dark room. Why do you suffer him without a guardian ?” On another occasion, finding an argument difficult to refute, he burst out with, “Who is the best lawyer, you or I ? . . . Oxford law is no better than your Oxford Divinity.” Whatever may be said for toleration, now firmly established as one of the great constitutional principles, it was supremely unwise to force it illegally upon a nation justly apprehensive of attacks on its rights and liberties. James' daughters were Protestants and time would bring about a cure, so they waited. But nothing would stay the course of proceedings, and eventually the Seven Bishops were, with Jeffreys' approval, prosecuted for saying what everybody thought. Their acquittal coincided with the birth of a son. This meant that no relief could be obtained by James' death. William of Orange was invited and landed. The nation joined him and James fled, bringing down with him his Chancellor, who had been so largely responsible for the King's acts.

Was Jeffreys really a bad judge ? I have discussed

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the question in the light of his reported decisions. I will reinforce them by two quotations. Sir Joseph Jekyll was a distinguished lawyer and a noted Whig. Yet he said that Jeffreys was "an able and upright man whenever he sat," and "a great Chancellor." Roger North, the Tory, whose brother had been Lord Chief Justice and suffered from Jeffreys' machinations, yet was constrained to say of the latter that "he became the seat of justice better than any other he ever saw in that place." In happier times it may well have been that Jeffreys would have earned a just title to the reverence which is due to the greatest judges. But it is certain that, whoever praises him, and in whatsoever age, he will go down to history as a blustering and bloody-minded rogue, convertible upon a shift of fortune into a fawning coward. And there is much to be said for this view.



THE RT. HON SIR JOHN HOLT  
LORD CHIEF JUSTICE OF ENGLAND





## SIR JOHN HOLT

OF all the able lawyers who were conspicuous in the profession during the reign of Charles II, three stand out in history as pre-eminent: Holt, Jeffreys, and Somers. Of these the first and last named owe their fame to the work they did after the Revolution. Jeffreys, who, almost the first of all barristers, perceived that riches and promotion come quickest to the fashionable advocate, completed his career with the fall of James, having by his ferocity and compliance with the King's desires earned a reputation which will blast his memory for all time. Holt rose by his skill and learning; and his career, with one short exception, was not concerned with politics. Somers, who first came into notice as a constitutional lawyer, thereby achieved judicial rank, but his chief work was the settlement of the Constitution. They were all almost exact contemporaries by birth, Holt being six years older than Jeffreys, Jeffreys two years the senior of Somers.

An account of Holt may, therefore, be confined to an estimate of his life as a practising lawyer and as a judge, and to an appraisal of the great services that he rendered by laying down the true lines of development of English law on the never-ending task of applying old principles to new circumstances. He was born with the advantage of a father who had attained distinction in the law, but his early life at school was without exceptional promise; at Oxford, which he reached in 1662, he became notorious for his wild companions and their drinking ways. He actually went down without a degree. It is said that years afterwards at Assizes he recognized, in a prisoner charged before him with a capital felony, one of his old companions, and on visiting him in prison learned that they two were the

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only survivors ; the hangman, he was told, had claimed the rest. His wild phase cannot have lasted long. He was called at his father's Inn when he was just of age, and for some years they were in practice at the same time. Such records as throw light upon his work proved that he was known to be an advocate reliable in cases calling for the display of sound learning and the exercise of alert judgment. His whole career, forensic and judicial, is a proof that he had acquired such a knowledge of law and such a grasp of its underlying principles as cannot be the possession of anyone who has not devoted himself to prolonged and intense study. After his call and throughout the rest of Charles' reign, he steadily increased both his practice and reputation, so that by the accession of James he was in most, if not all, of the important cases that arose. In 1686 he was appointed Recorder of London, but within a year he resigned rather than pronounce an illegal sentence against his conscience, though at the time his action must have seemed a death-blow to ambition. When the Revolution changed the political situation, he made a short incursion into Parliamentary life, but hardly had the throne been accepted by William, when he was appointed to preside over the Court of King's Bench. Here he was to remain for the rest of his life, and here his influence determined the course of modern developments. The common law judges were charged with jurisdiction in criminal matters, and in the ordinary litigation between disputants. All mercantile disputes fell to be decided by the common law, and Holt, first of all modern judges, perceived that this jurisdiction could not be properly exercised without regard to conditions of commerce which had become transformed and world-wide. Before him came disputes on mercantile contracts, and he adopted and applied to the decision of these disputes the habits and customs of merchants. Where the English law offered no guide, he did not shrink in case of need from inquiring

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into the practice of foreign courts. He settled the principles upon which men are fixed with responsibility for their employees and agents. While leaving to Mansfield the great work of incorporating the merchant law with the common law so as to form one consistent whole, he anticipated that great lawyer in many ways and facilitated his task. In the region of constitutional law, his mind worked steadily in favour of civil freedom, and he declined to bend to any influence, whether exercised by the Court, or by either of the Houses of Parliament. To the criminal his influence was a blessing. Though North had shown that he conceived of a prisoner as a fellow creature, it was Holt who set almost the first shining example of impartiality and humanity in criminal trials. In most cases at that date the prosecution was conducted by counsel, and the judge had been apt to "lead" for the prosecution, while the wretched prisoner was denied assistance. Holt realized that the judge should hold the scales of justice even. Where a prisoner set up a defence, he saw to it that it was properly developed. He discontinued the practice of bringing prisoners into Court in irons, disallowed evidence of previous convictions, and allowed prisoners to interrupt him if they sought to correct him in his statement of the evidence. He did, it is true, still continue to question prisoners, but that practice was not, in his hands, to the prejudice of the innocent. Sir Richard Steele said of him in *The Tatler* that he was "a man of profound knowledge of the laws of his country, and as just an observer of them in his own person. The prisoner knew that, though his spirit was broken with guilt and incapable of language to defend itself, all would be gathered from him which could conduce to his safety, and that his judge would wrest no law to destroy him nor conceal anything to save him." Surely, a noble tribute.

Thus for twenty-one years Holt lived as the senior judge of the Courts of Common Law, and so guided the English

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law at that season of doubt and change that it began to accord with the conditions of modern life throughout the civilized world.

Sir John Holt's family came originally from Lancashire, but he was born at Thame on 30th December, 1642, the eldest son of Sir Thomas Holt, a well-known practitioner, who attained the rank of Serjeant at Law and became Recorder of Reading and of Abingdon. Before the boy was ten years old he was entered at Grays Inn, of which his father was a Bencher, but naturally for some years his membership was only nominal. He was educated first at Abingdon, and then at Winchester, and in 1658 went up to Oriel College, Oxford. He was called to the Bar at Grays Inn by Hardies on 2nd February, 1664, at the early age of twenty-one, a fact which in part must have been due to his father's position at the Inn. He early attained a practice in solid cases, and he rose steadily. At his Inn he became an Ancient in 1676, and was elected a Bencher in 1682, but did not become Reader or Treasurer, as he necessarily left the Inn on becoming a Serjeant at Law in 1686. His chambers were on the first floor of a building standing on the side where the East Library of Grays Inn now is. His early cases were mostly of professional or technical interest, but one he afterwards recalled on the Bench is of some little importance. In *Green v. Waller* (2 Ld. Raym. 891) he mentioned that he appeared for the plaintiff in an action of trover, claiming a ship, which was tried by Lord Chief Justice Hale (who retired in 1676). The ship was an English ship which had been captured by the French during a war between France and Holland and condemned as prize on the ground that it was a Dutch ship. Afterwards the plaintiff bought it, but the former owner set up a claim. It was clear on the jury's finding that the ship never ought to have been condemned, but, nevertheless, Holt's client won, since the decree of a Court of Prize is binding on the whole world, and not, as is usual,

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only as between the parties to the actual suit. He often recalled cases in which he was concerned at the Bar. Thus, during the argument of *Andrews v. Lynton* (2 Ld. Raym. 884), while counsel was arguing that Jones' report of *Deveney v. Norris* must be right, as Jones was one of the judges, while Levinz, who gave the opposite result, was not, Holt interposed to say that he was counsel in the case and Levinz was right. His first constitutional case of first-rate importance was the Impeachment of Lord Danby in 1679, and, shortly afterwards, he appeared for Lords Powys and Arundel, against whom, however, the prosecution was abandoned. The authorities had taken note of him, and he appeared in a number of Crown prosecutions, notably *Giles* (1680); *Bethel* (1681); *Pilkington* (1683); and for the defence, *Sacheverell* (1684). He was, however, not identified with the Court, and appeared for William Lord Russell on his trial for high treason in 1683, in which year he was engaged also in the great case of the East India Company. Next year he acted for the defendant in *Lord Macclesfield v. Starkey*. By this time he had obtained a commanding position at the Bar and his name appears in case after case.

In February, 1686, he was appointed Recorder of London. The position of the City was anomalous. By the *Quo Warranto* proceedings the charters had been forfeited and the new Charter made the Corporation subservient to the Court and utterly unrepresentative of the City. Jeffreys was all-powerful there, and it must have been his wish that Holt should be Recorder. It is said that he had expressed a view in favour of the *Quo Warranto* proceedings and that this determined his appointment. It was, however, a mistake on the part of the Crown. In 1687 he was called upon, in accordance with the custom at that time, to sentence all the prisoners who had been convicted during the session of the Old Bailey. One of them was a soldier whose only offence was desertion. Now, as James had formed a

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standing army, and the articles of war did not apply in time of peace (for the solution of the constitutional problem by the passing of an annual Mutiny Act was not reached until after the Revolution), the prisoner was merely guilty of a breach of contract. The Recorder was expected to sentence him to death, and, to escape this, he resigned. He thereby sacrificed all hope of judicial promotion under James. The sacrifice, however, was not in vain. At the Revolution Holt was regarded as an adherent to William, and he was summoned to attend the Convention Parliament as a legal assessor, and examined upon the King's Dispensing Power. On 31st January, 1689, he was elected member for Beeralston, and, during the ensuing session, he was chosen as one of the Commons' representatives to confer with the Lords upon the constitutional questions in difference between them. It is said that when the Commons insisted upon inserting in the resolution, declaring the Throne to be vacant, a statement that James had "deserted" the Throne, to which the Lords objected, Holt effected a compromise by suggesting the word "abdicated." His Parliamentary career was abnormally brief, for on 17th April, 1689, he was appointed Lord Chief Justice of the Court of King's Bench, an appointment noteworthy for the fact that he had never been a Law Officer nor was he a prominent politician, but was appointed solely by reason of his merit as a lawyer. Later in the year he was sworn of the Privy Council.

The Revolution effected a fundamental change in the status of judges. Until then they had held office during the King's pleasure, but since then they have been appointed to act so long as they conduct themselves worthily, so that they can only be removed by the King if an address to him be passed by both Houses of Parliament. Holt was the first Chief Justice to be appointed under the new conditions. He remained Chief Justice until his death in 1710. He could have attained the Woolsack, but, when offered it

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in 1700, he declined the Great Seal because he felt that he was not sufficiently versed in Equity, the Lord Chancellor being then the judge of the Court of Chancery. He did, however, for seven weeks at this period act as Chief Commissioner of the Great Seal, which involved the decision of such cases as arose within that period.

On William's death in 1702, a new point arose. Previously, the death of the Sovereign *ipso facto* determined the appointment of judges, but the new conditions prescribed that they should hold office *quamdiu se bene gesserit*. It was, however, concluded that the change did not affect the vacating of office by reason of the King's death, and two judges, Turton of the King's Bench, and Hatsell of the Exchequer, were informed that they would not be reappointed, and they acquiesced without a struggle. The other judges received new patents, except Holt, who was reappointed by writ. Sir Joseph Jekyll, Chief Justice of Chester, claimed that he had not vacated his position, as he had been appointed for life, and this claim was not disputed. The rule has since been altered, and judges are not affected by the demise of the Crown. For eight years Holt continued to sit, but, eventually, he contracted a lingering illness and died on the 5th March, 1710. His successor, Parker, owed his appointment, while still youngest of the Serjeants, to the fact that he was a prominent advocate of the impeachment of Sacheverell which had then just begun. Holt had married on 28th June, 1675, Anne, the daughter of Sir John Cropley, Bart. They left no issue.

The subject of our sketch was not a legal author, and his contributions to the science of law have to be gathered from the various reports which record his judgments with more or less accuracy. The best is Lord Raymond's *Reports*; it is not easy to say which are the worst. He was driven on one occasion to remark of the *Reports* known as "Modern": "See the inconveniences of these scrambling



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reports. They will make us appear to posterity as a parcel of blockheads." Willes, C.J., has observed : " Upon examination I have found many of the sayings ascribed to that great man Lord Chief Justice Holt were never said by him." Imperfect as they are, they must form the main source from which his work may be judged, but it is of assistance to bear in mind that in difficult times men of all parties trusted him and extolled his legal greatness.

As an advocate, he relied upon reason and authority, and he was specially employed in cases of substance, where a sound, clear-headed lawyer was required. His early training was under Hale, whose habits of mind and detestation of sham and trickery made him the best of judges before whom a young man could gain experience. I have already referred to one case, where he relied upon one point which alone was decisive. In 1677 he won another interesting case. Dr. Voscus, the celebrated Dutchman, had, in the disturbances which divided Holland into warring camps, been deprived of his pension, and came to England, where he became a friend of Dr. Browne. When the latter died he was found to have devised to Voscus certain lands " during his exile ; and if it should please God to restore him to his own country," then the lands were to go to the plaintiff, who claimed that, as the war with Holland was over, Voscus could return there, and could not, therefore, be said to be an exile. The pension had not been restored. Holt's argument for Voscus rested upon the true meaning of the word " exile," and he was successful in persuading the judges to hold that voluntary exile was included. On 14th July, 1680, he prosecuted John Giles, at the Old Bailey before Jeffreys as Recorder, for the attempted murder of John Arnold. This case has been cited by Stephen as one where Jeffreys behaved admirably. Arnold was a Justice of the Peace for Monmouthshire, and had made himself conspicuous in the troubles arising

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out of the Popish Plot. Having occasion to come to London on legal business, he was, on 15th April, 1680, passing along Bell Yard at 10 or 11 p.m., when he was seized by three men, of whom the prisoner was one, and pulled into Jackanapes Lane (a thoroughfare which has long since disappeared), where a murderous assault was committed upon him. Holt made the opening speech, which was clear and concise, and examined a number of witnesses. The prisoner was convicted and sentenced to be pilloried, fined £500, and ordered to find sureties for his good behaviour during the remainder of his life.

In *Bethel's Case* (1681), Holt's task was more difficult. Bethel was one of the two candidates against the Court at the election for Southwark on 12th March, 1681. Robert Mason, of Lambeth, the King's Waterman, came to the election in his livery for the purpose, as he said, of preventing non-voters from Lambeth from voting, or, as the defendant asserted, to intimidate voters and to assault Bethel and his colleagues. There was undoubtedly a serious scuffle. There was a conflict of evidence, and Holt's reply for the prosecution showed that he was an extremely competent advocate, capable of dealing clearly with complicated evidence. He secured a conviction, and the defendant was fined 5 marks (£2 3s. 4d.), which he paid at once.

In *Lord Russell's Trial*, in 1683, for high treason, the function of counsel was, of course, limited to argument on points of law. Pollexfen led Holt, but the only issue they argued was whether the jurymen should be freeholders. The argument turned on the effect of a number of old Statutes, and, on the point being overruled, Russell was left to conduct his own defence. He was convicted and executed.

In *Sacheverell's Case* (1684) the proceedings were for a riot at Nottingham, on the occasion of the election of a

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Mayor on 29th September, 1682. There were twenty-four prisoners and the trial was in London in the King's Bench. The jurors were, at the defendant's request, drawn from Kent, as being the next county to Nottingham! Pollexfen led Holt for the defence. Jeffreys presided. He had taken a leading part in the surrender of City Charters, and Nottingham had been deprived of its charters by *Quo Warranto*. A new charter had been granted, which put the Council under the control of the Crown, and proceedings were pending, both in the King's Bench and in Chancery, to try its validity. Jeffreys made no attempt to conceal his bias. The first breeze sprang up when Pollexfen objected to the retiring Mayor on the ground that he was an interested witness. He was told that the Court would not try the validity of charters on an information for riot, which was hardly the point. Holt followed, but Jeffreys forced him to desist. The examination of the witnesses was taken out of counsel's hands, and the cross-examination was continually interrupted. When Holt was speaking for the defence, Jeffreys peremptorily ordered him to call his witnesses, the examination of whom he interrupted and hindered throughout. Finally, twenty of the accused were found guilty and fined.

Another notable case in which Holt was concerned was the *East India Company's Case*, which was argued on a number of occasions in 1683 and 1684. It was finally decided that the King could grant to the Company a trading monopoly to foreign parts. To attempt to describe most of his work would, however, be as dull as writing an account of the career of an eminent commercial lawyer would be nowadays.

It is upon his work as a judge that Holt's fame rests. The twenty-one years during which he sat in the King's Bench mark a period of reorganization and new departure. During the latter years of Charles II, and more especially under James, the Bench had lost nearly all its reputation for

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impartiality and uprightness. Under Holt that reputation was quickly re-established and enhanced. Judicial manners were reformed, and both litigants and counsel assured of a courteous hearing. Nor was the Chief Justice of that disposition which insists upon domination. He remembered that he was *primus inter pares*, and the puisne judges with him were colleagues and not echoes. They freely expressed their views, and, on a number of occasions, they all differed from him, though in those instances posterity has usually preferred the Chief Justice's opinion to theirs. In the ordinary work of the Court, in the arguments on technical points which often make the modern reader wonder whether the practice of the Courts was not rather a game of chess than designed for the administration of justice, he moved easily and confidently as a master of his craft. If that were all, he would merely have been one of the great body of English judges who have done their duty. In three aspects of law Holt's work raised him above the others, and thereby he has earned the rank of a great lawyer and judge. It was in the fields of constitutional law, commercial law and criminal law.

In all matters concerning the rights and liberties of the subject Holt showed himself to be an unwearying opponent of unconstitutional and illegal encroachments from whatever quarter they came. I have already mentioned his resignation of the Recordship of London. At the Revolution, he was consulted as to the legal exercise of the King's dispensing power. The Bill of Rights left the matter vague : it declared that the recent exercises of that power had been illegal. Holt was clear that that Statute did not impair the prerogative of mercy. In *Parson's Case*, (1691, 2 Salk. 499), he decided that the King could still pardon persons convicted of crime, and in *Sir John Fenwick's Case*, (1696), he, with the other judges, advised the King that all or any part of a penalty imposed by Bill of Attainder could be remitted. Sir John was ac-

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cordingly beheaded, the barbarities included in the Statute being remitted. In 1694 he came into conflict with the House of Lords. Charles Knollys, who claimed, as does his present descendant, to be Earl of Banbury, was arraigned before Holt and claimed to be tried by his peers. He had already petitioned the Lords to be so tried, but the petition was rejected and an order made that he should be tried in the ordinary course of law. Holt tried the issue. It was objected that the prisoner's claim had already been rejected by the Lords, but he held that their resolution was not a judicial decision nor was it binding upon him, and eventually held that the prisoner had made out his claim to be a peer. He was bailed, and, as the deadlock was never removed, he remained on bail for the remaining forty-five years of his life. The Lords, not unnaturally, were annoyed, and sent to Holt to inquire the reasons for his action, but he declined, unless his decision came before the House on appeal (which was impossible), because he would not make a precedent which might injure his successors. There was some talk of committing him, but the strict propriety of his behaviour in the matter was too obvious, and the whole affair blew over.

In 1704 came the great dispute over the rights of voters. At the Aylesbury Election the constables of the borough refused to allow a number of burgesses to vote, though they were duly qualified. Ashby, who was one of them, sued the constables for damages in the great case of *Ashby v. White*. He had suffered no loss, and his candidate was elected. In the King's Bench the plaintiff lost, Holt being in a minority of one in his favour. He laid down the rule that every right has a remedy, and that the violation of a right is in itself sufficient damage to be a cause of action, though the injured party "suffers not a farthing and the pecuniary loss be nothing." To the objection that Parliament was alone the judge of Parliamentary matters, he answered that, if such matters arise as incidents to an

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action, the Courts must determine them. The plaintiff appealed to the House of Lords and won. This led to serious disputes between the two Houses, which were not helped by the fact that many others started similar actions. It is difficult to see how the matter could infringe the privileges of the House of Commons, who then decided election petitions, seeing that the plaintiffs were supporters of the candidate returned and, consequently, had no desire to unseat him. The Commons, however, voted the bringing of such actions a breach of privilege, and committed one, Paty, and several others to prison for doing so. Paty applied for a writ of *habeas corpus*, but the Court held (Holt again being in a minority of one) that it could not sit in judgment on the privileges of Parliament. In the Chief Justice's opinion a man's right to bring an action could only be taken away by law, and not by a resolution of either House : " It is the law that gives the Queen her prerogative : it is the law gives jurisdiction to the House of Lords ; as it is the law limits the jurisdiction of the House of Commons." The opinion of the majority of the Court has been upheld in a later case, though the Commons, to avoid Holt's reasoning, afterwards committed for contempt without stating the cause, so that there was no opportunity of challenging their reasons. The jurisdiction to commit for contempt was beyond question. He was not hostile to the Commons as such. Whenever their exclusive jurisdiction was made clear he respected it. Thus in *Prideaux v. Morris*, (1703, 1 Salk. 502), he agreed that no action lay against the sheriff for a false election return, unless the matter had been determined in Parliament, or, by reason of a dissolution, could not be determined there. Willes, C.J., in *Wynne v. Middleton*, (1 Wils. 125), said that he would always set his face against this decision which he thought was wrong. Again in *Kendall v. John*, (1707, Fort. 104), Holt held that no action lay for a double election return. He pointed out that not only could the

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Commons decide the issue but could put matters right by altering the return. In the actual case the Commons had decided that the plaintiff was duly elected, and, therefore, he could not sue for a false return since that would contradict the record. In *Child v. Sands*, (1692, 1 Salk. 31), where an interloper complained that the East India Company had caused the authorities to detain his ship which was bound for parts where the Company had the monopoly of trade, he declared that the King might lawfully lay an embargo upon shipping, but only for the public good, not for the private advantage of a trader or company.

In several cases he anticipated Lord Mansfield's decision in *Summersett's Case* by holding that an action could not lie for the person of a negro. In his opinion, as soon as a slave came to England he became free. "One may be a villein in England, but not a slave" (*Smith v. Brown* and *Smith v. Gould*, 2 Salk. 666 ; *Chamberlain v. Harvey*, 1 Ld. Raym. 146). He did not deny that slavery could exist in a colony if the laws of the colony recognized it. In *Smith v. Brown*, he repeated for Virginia the doctrine that he had laid down in *Blankard v. Galdy*, (2 Salk. 411), that, when an uninhabited country is newly found by English subjects, all laws in force in England are in force there, but that Jamaica having been conquered, and not being part of the Kingdom, but part of the possessions of the Crown, the laws of England had no effect there until declared by the King or his successors. This rule explains the diversity of laws within the Empire. In *Kendall's Case*, (1695, 1 Ld. Raym. 65), he upheld the validity of the existing practice for a Secretary of State to commit people to prison on charges of high treason. His language was general, and, afterwards, Lord Camden in *Entick v. Carrington* expressed the opinion that, if the judgment extended to cases other than high treason, it was too wide.

In ordinary civil actions there was a great increase in the

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cases arising on mercantile transactions. The accession of William increased the facilities for oversea trade, and, with the expansion of banking facilities and the great use made of bills of exchange and other commercial documents, the judges were called upon to express opinions upon points which had never arisen in that form before. Holt realized that the jurisdiction in cases arising under the law merchant, which had been acquired for the Courts of Common Law by Coke, could not be rightly exercised unless due regard were had to the course of business between merchants. He laid down as a general principle that the law would take notice of the common custom of merchants, *Hawkins v. Cardy*, (1698, 1 Ld. Raym. 360), and he freely admitted evidence of mercantile customs, thereby anticipating Lord Mansfield, as he did in adopting the practice of consulting merchants. In *Mitford v. Walcot*, (1700, 1 Ld. Raym. 574), he mentioned that, when the point arose in *Jackson v. Pigot*, (1 Ld. Raym. 364), two years before, whether a bill could be accepted after the date named for payment, he had had all the eminent merchants in London at his chambers in Serjeants' Inn during the Long Vacation. This practice enabled him to develop the rules of law along the lines settled by the course of business among prudent and upright merchants. He was, however, quite capable of disregarding views which he believed to be at variance with the law. Thus, in *Ward v. Evans*, (1703, 2 Ld. Raym. at p. 930), he decided that, "when a servant is sent to receive money on a bill he cannot accept a note instead of money without the particular direction of his master . . . But, indeed, if the master does give his consent subsequent to the taking of the note, that will amount to authority precedent. But I am of opinion, and always was (notwithstanding the noise and cry that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street) that the acceptance of such a note is not actual payment . . . it is always intended to be taken under the condition—to be



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payment if the money be paid therein in convenient time."

His statements of the principles governing the liability of an employer or principal for his servant or agent have a modern ring. He anticipated the rule that an employer is liable, under a general authority, for what the servant does under that authority without the master's express directions. Thus, in *Turberville v. Stamp*, (1697, 1 Ld. Raym. 264), he laid down that a farmer was responsible for damage done by a fire kindled by his servant. "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority from his master, it being for his master's benefit." On the other hand, he held that extra services rendered by a servant in return for a tip do not make his employer liable: "though money be given to the driver, yet that is a gratuity . . . no master is chargeable with the acts of his servant but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master." *Lane v. Cotton*, (1701, 1 Ld. Raym. 646), was decided against his opinion and is the authority for the rule, now laid down by Statute, that the Postmaster-General is not liable for packages lost in the post. In *Keite's Case*, (1696, 1 Ld. Raym. at p. 144), he gave it as his opinion that "if a master gives correction to his servant, it ought to be with a proper instrument such as a cudgel, etc. Then, if by accident a blow gives death, this would be but manslaughter . . . But a sword is not a proper instrument for correction."

In the great *Bankers' Case*, (14 S.T. 1), arising out of Charles II's repudiation of his obligations to the goldsmiths of Lombard Street, he, with the other judges, established that a petition of right was available for a subject

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to claim damages against the Crown for breach of contract.

His views on slander actions are worthy of note. In *Baker v. Pierie*, (1703, 2 Ld. Raym. 959), there was the usual hairsplitting of the times as to words which were, and were not, defamatory. Holt said, "It is not worth while to be very learned on this point, but where words tend to slander a man and take away his reputation I shall be for supporting actions for them, because it tends to preserve the peace"; and he mentions a case of which Mr. Justice Twisden told the story that, if the plaintiff had had any idea that he would lose, he would have cut his throat.

Many of his decisions have become classics. *Coggs v. Bernard*, (1703, 2 Ld. Raym. 909), is still the leading authority on the law of bailments. The defendant had undertaken to take up certain casks of brandy lying in a cellar at Brooks Market, in the parish of St. Andrew, Holborn, and carry them to another cellar at Water Street, St. Clement Danes. While they were being set down one was staved, owing to the defendant's negligence, and 150 gallons of brandy spilled. It seems a large quantity for one cask. The plaintiff sued for damages but did not allege that Bernard was a common carrier or that he was to be paid for his trouble, and the point arose whether in such circumstances he was liable. Holt's judgment is an elaborate review of the whole law on the subject, in which he freely quotes Roman Law, a fact which has, perhaps, earned him a greater reputation as a civilian than he deserved. The damages awarded were £10, and the costs were taxed at £22.

*Price v. Torrington*, (1704, 2 Ld. Kaym. 873), was an action for beer sold and delivered. The only trouble was to prove delivery, as the drayman was dead, but Holt admitted as evidence entries in a book signed by him in accordance with his duty to do so at the end of each day's

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work. Had he been alive, he could only have used the entries to refresh his memory.

*Birkmyr v. Darnell*, (1705, 2 Ld. Raym. 1085), is a leading authority on the distinction between going surety for another's debt, and making oneself primarily liable for goods sold to another.

*Thornborough v. Whitacre*, (1705, 2 Ld. Raym. 1164), was a curious case in which Thornborough took advantage of the defendant by paying him half-a-crown in return for a promise to deliver him a quantity of rye calculated in this way. The next Monday Whitacre was to deliver two grains, on the Monday fortnight after that 4 grains, and so on every alternate Monday for a year, doubling the quantity each time, and on completion Thornborough was to pay £4 7s. 6d. more. Whitacre soon found that he could not possibly fulfil the contract, and, when sued, relied upon the principle of law that an impossible contract was void; but, as the Court pointed out, such a contract is one that no one can perform, not one which the party finds he cannot possibly fulfil. As the Court was against Whitacre, he compromised by paying back the half-crown and paying all the costs, and so no judgment was given.

Throughout all branches of law one may still cite judgments delivered by Holt. His statement of the law governing a husband's liability for his wife's debts is almost exactly true to-day. He ruled that to obtain damages for a dog-bite the plaintiff must show that the owner knew that the dog was ferocious. One decision does sound curious. He held that a jewel could not be made an heirloom, "but only things ponderous, such as carts, tables, etc." He kept closely to the point, but frequently mentioned relevant cases in which he had been counsel, and sometimes even strayed into anecdote. In one case he mentioned that he had tried a former action between the parties, and the reason why the damages were so small was that the jury came to the conclusion that both were drunk. In another case he

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recalled that he once knew an ostler who greased his horses' teeth to hinder them from eating oats. He often cited Hale's decisions, and, in common with both counsel and the other judges, held him in great respect.

He did a great work in reforming criminal trials. It fell to him to preside over many trials for treason, which he conducted with exemplary patience and fairness. When the Jacobite, Lord Preston, came before him he gave the prisoner unusual latitude ; not only did he permit him to interrupt the summing up, but even allowed him to speak last after summing up was ended. In November, 1696, he tried Thomas Vaughan for treason. The prisoner, on coming into Court, complained of his irons, and Holt had them struck off. The defence was that the prisoner was a Frenchman serving with the French fleet when he was captured in his vessel *The Loyal Glancarty* off Deal. During the trial, one of his boyhood's playmates in Galway came into Court out of curiosity, recognized him, and was promptly called to give evidence. The prisoner was convicted. The Chief Justice was sceptical in matters of religion, and never failed to secure an acquittal on charges of witchcraft. Once an old woman was tried before him on that charge, and admitted that she used a spell. It proved to be a Latin sentence written on a piece of paper, which, she said, a young gentleman had given her years before to cure her daughter of an ague. Holt informed the jury that he was the young man. Once, with some friends, he had been to an ale-house, and, being unable to pay the score, had played on the woman's superstitious credulity by giving her the paper as a cure for her daughter. Like many men of a sceptical turn, he had no sympathy with dissent. In *Larwood's Case*, (1694, 1 Ld. Raym. 29), he ruled that the King had a right to call upon a subject to serve in any capacity for which he was considered suitable, and, though the Test Act created a disability, it was no defence, because

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the defendant had created the disability himself by not complying with the Test Act, and so had to pay the penalty inflicted for not serving. The defendant appears to have pleaded that he had complied with the Toleration Act. In *Ascomb v. Spelholm*, (1690, 2 Salk. 613), the plaintiff had brought an action against a hundred for a robbery committed upon his servant within the hundred, the law then giving a right of action in such cases. The facts were clear, but the servant, simply because as a Quaker he declined to take any oath, refused to swear that he knew none of the robbers. Holt entered judgment for the defendants, saying that it was the master's folly to employ such a servant.

He did not try any very remarkable murder cases. The celebrated trial of Spencer Cowper at Hertford for the murder of Sarah Stout, a Quakeress, who committed suicide out of hopeless love for the accused, came before Baron Hatsell. Cowper was acquitted, and afterwards became a judge. Holt was one of the judges summoned for the trial, before the Lord High Steward, of Lord Mohun for being party to the murder of Will Mountford, the actor, by Captain Hill, because the peer's friend believed that the beautiful Mrs. Bracegirdle preferred Mountford to him ; and also on the later trials of the Earl of Warwick and Lord Mohun for murder in the course of a midnight duel in Leicester Fields. In 1696 he was one of those who tried Dawson and other men for piracy. They had seized their ship, the *Charles II*, while lying off a Spanish port in May, 1694, and went off on a cruise, during which they captured and sank a number of vessels. In *Harrison's Case*, in 1692, for the murder of Dr. Clenche, Holt excluded evidence of previous convictions adduced to show the prisoner's guilt. The prisoner was convicted and was executed, protesting his innocence to the last. When sentenced by the Recorder at the end of the Sessions, Harrison took several objections, and, during the argument,

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he said, "I must needs acknowledge that I was tried before the best of judges, my Lord Chief Justice Holt." In *Tutchin's Case*, in 1704, he was prepared to hold that any criticism of the Government constituted a criminal libel. The jury found Tutchin guilty of publishing only but not of writing. Afterwards, the indictment was quashed on technical grounds, and the prosecution was never revived. He did not give any remarkable decisions on criminal law. His merit was that he tried the issues fairly and impartially, remembering that a prisoner, unless helped, might, through ignorance or fear, fail to make good a defence which ought to be placed before the jury, and seeing that in such cases the prisoner's points were not lost merely because he had no advocate.

When he died he had earned the respect of the whole nation, and has since been accorded rank among the great judges of England. Posterity has not endorsed the opinion held by contemporaries of his great learning in matters outside English law, and his acquaintance with foreign laws was not so great as Lord Mansfield's. This is, perhaps, as well, for in his day the principles of mercantile law had to be discovered, and he resorted to the true source, the practice of merchants. Had he borrowed from foreign systems more freely, there would have been the danger that principles might have been adopted wholesale that were incompatible with the developments then taking place in the world of commerce. By Lord Mansfield's time, such learning came in for its proper use : the filling up and the rounding off of the body of law already existing. In one respect he failed to see an advantage of which Lord Mansfield made full use. He was distrustful of the extensions taking place in the action called *indebitatus assumpsit*. Under the later judge this form of action was encouraged, and became the parent of the flexible action of contract that is so familiar.

Rarely has there been a man who, in times of grave

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doubt and difficulty, so happily steered the right course, or did so much to serve the eternal principles of right and justice.

When he died, Lord Raymond affirmed in his reports that Sir John Holt had executed his office "with great reputation for his courage, integrity, and complete knowledge in his profession."



THE RT. HON. JOHN, BARON SOMERS  
LORD HIGH CHANCELLOR.

From a picture by Sir G. Kneller, in the possession of the Royal Society





## LORD CHANCELLOR SOMERS

THE career of Lord Somers may be counted, even in a lawyer's heaven, as almost ideal. Born of parents whose position, though not exalted, was very respectable ; drawing strength alike from intellect and industry, he was enabled by his own merits, by the attraction he exerted over men of position, and by the generous affection of his colleagues at the Bar, to attain in early manhood a position where his instinct for Constitutional Law, and his aptitude for high business, were exercised in the settlement of the affairs of a nation upon principles which accorded with the genius of that nation. Profundity and subtlety of knowledge, the favour of friends, the chances of politics, all combined to associate the occasion with the man. Those who value Parliamentary government in a Constitutional Monarchy owe a debt of gratitude to the shining memory of John Somers.

He sprang from a family belonging to the small landed gentry. One of his ancestors, in very early days, against every apparent interest, embraced the Protestant religion. His grandfather secured material advantage therefrom on the overthrow of the Roman faith in the grant of White-ladies at Claines in Worcestershire, when the convent there was dissolved. His father, also John Somers, was an adherent of the Parliament against Charles I, and commanded a troop of horse in the Civil War. After the fighting was over, he settled down as a prosperous country attorney who gained the confidence of the great landowners, among them the Duke of Shrewsbury, whose factor he became.

A great thread of consistency, it will be found, ran

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through this family. John Somers, the elder, had three children ; one son, the subject of this article, and two daughters, of whom one became the mother-in-law of the famous Lord Hardwicke (himself the son of an attorney), and the other married Sir Joseph Jekyll, who attained the office of Master of the Rolls. The son who concerns us was born at Whiteladies on 4th March, 1651 ; and, consequently, was old enough to remember the Restoration. He was educated at the Cathedral School at Worcester and at the School of St. Mary at Walsall and at Sheriff Hales. On the 23rd of May, 1667, he matriculated at Trinity College, Oxford, but did not remain in residence long enough to take a degree. He did not, however, waste his time there, but devoted himself, in rather a miscellaneous way, to the study of languages and literature, both classic and modern. He had an aptitude for languages, of which, indeed, he is said to have mastered seven. While at Oxford he decided to be called to the Bar ; probably the length of time which was then necessary to pass as a student influenced him in leaving Oxford so soon.

On 24th May, 1669, he entered as a student at the Middle Temple and went into chambers in Elm Court. His life there calls for little special remark. He studied law in general, including that of Rome, but did not pre-empt his pursuit of languages. He was not over-addicted to social life, holding a little aloof, and choosing rather to read in his study. And thus he began to acquire considerable knowledge of politics and of constitutional history. He was called to the Bar on 5th May, 1676. It was his good fortune to attract the attention of two men of established position—of Sir Francis Winnington, who was Solicitor General from 1674 to 1679, and of the Duke of Shrewsbury, who manifested a sustained interest in his agent's promising son. Through the latter he became acquainted with the Whig group, of whom the ill-fated William, Lord Russell, and Algernon Sidney were con-

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spicuous members. His learning was soon harnessed to their political chariot. In 1680 he wrote a small work on the Succession to the Crown, designed to further the Exclusion Bill. In 1681 he wrote three more : *A Just and Modest Vindication of the Proceedings in the Last Two Parliaments* (a reply to Charles II's Declaration of 8th April, 1681) ; *The Case of Denzil Onslow*, 20th July, 1681, touching his election at Haslemere (directed against faggot voting) ; and *The Security of Englishmen's Lives*. This last work was written to defend the Grand Jury which had thrown out a bill of indictment against Lord Shaftesbury for treason. The feeling that, even now, a Grand Jury may be called upon to perform a similar service contributed, as I have reason to know, to the retention of the Grand Jury system after its recent suspension during the Great War.

Although Somers enjoyed a great reputation in his own branch of the profession and among his political associates, he never, oddly enough, gained a lucrative practice. In 1688, however, he turned the tide when he was retained as junior counsel for the Seven Bishops. The nation was almost unanimous in their favour ; and they had the advantage of the advocacy of the most eminent lawyers of both political parties. It is said (I know not with what truth) that the Bishops did not desire Somers to be retained, and that he was only briefed because Pollexfen refused to act without him. He did little in Court until the end when he made a short but telling speech for the defence, which contributed in no small measure to an acquittal which made the nation delirious with joy.

As the Revolution followed almost immediately, Somers' career was assured. At the end of the year he was elected Recorder of London, but declined the office. In the Convention Parliament he was returned for Worcester and took a leading part in the debates and negotiations which resulted in the vacancy of the Throne, and in the conse-

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quent accession of William and Mary. On 20th March, 1689, he was elected a member of the Committee of the Commons to draw up an address of thanks for William's declaration in favour of the Church of England. He succeeded in bringing about the practical compromise of the religious settlement. Toleration was to pass; the Oaths and Tests to remain; and Comprehension to be abandoned. It was during this period that he showed his wizard skill in arranging the practical compromises which are essential in a supreme crisis to the working of constitutional government. He was chairman of the committee which drafted the Declaration of Right, and, it may be assumed with some confidence, that he was the main craftsman of this landmark of the Constitution. A man of learning who shows intuitive skill in the handling of affairs does not usually beat long or vainly at the door of promotion; and it is not surprising that on 4th May, 1689, he became Solicitor General. Six days later he was elected a Bencher of his Inn, and on 31st October of the same year he was knighted. In 1690 he became Treasurer of his Inn, a very exceptional compliment to a Bencher of a year's standing. In this year appeared a political tract, entitled *A Vindication of the Proceedings of the Late Parliament, A.D. 1689*, which is attributed, though not with complete certainty, to his pen. As Solicitor General he prosecuted, before Chief Justice Holt, the Jacobite, Lord Preston, for treason. On 2nd May, 1692, he succeeded Sir George Treby as Attorney General, and, in that capacity, prosecuted Lord Mohun for the murder of Will Mountford.

A law officer could, of course, then act for private clients, and, in this year, he appeared for the plaintiff in an action, *Duke of Norfolk v. Germain*, for criminal conversation. During the winter of 1692 he supported a Bill for the better protection of their Majesties; but this effort was stillborn. He sat in Parliament, though Attor-

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ney General, without question. It will be remembered that when Bacon became Attorney General the Commons made an exception in his favour, but resolved that no other Attorney General should sit in the House. Soon after the Restoration the rule was broken and succeeding Attorneys General have sat in the Commons without question.

Until 1693 William had kept the Great Seal in commission, but he made a change on 23rd March of that year by entrusting the Great Seal to Somers as Lord Keeper. The King had hitherto insisted on exercising the judicial patronage of the office, but Somers resolutely, and with success, asserted his right to appoint judges. In August, 1693, he, with others, succeeded in securing the dismissal of Sir Richard Temple from the Commission of Customs. In 1694 he incurred great odium by purging the lists of Justices of the Peace. The ostensible object was to dismiss those who refused to sign the Association for the Protection of the King and Queen, but the real purpose was to drive out the Tories. Justices who were known to belong to that Party were ruthlessly extruded, even after they had signed the Association. For some time Somers declined to accept the higher rank of Lord Chancellor, though the duties were the same as those of the Lord Keeper. Probably the reason was that his means would not support a peerage, for, when on 23rd April, 1697, he became Lord Chancellor, and subsequently was created a peer, he was granted two royal manors and a pension of £2,100. He remained in office until 1700, when, in circumstances which we shall examine, he was dismissed.

During the period he was engaged in matters of High State. From 1694 to 1699 the wars frequently called William abroad, and the administration of England was entrusted in his absence to a body of persons called Lord Justices, of whom Somers was the head. So much did this identify him with the King's policy that he incurred

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odium for measures which he actively opposed in council. It was not then (or for years afterwards) the practice to leave the government in the hands of a Cabinet ; nor were Ministers in theory bound to support each other. William acted as his own Foreign Minister and Commander-in-Chief, and only gradually, and a little unwillingly, felt his way towards party government. Somers was one of his most trusted advisers, but he was only an adviser. One example occurred on the conclusion of peace, when it was proposed to limit the Army to a small force entirely composed of Englishmen. The King, deeply wounded, threatened to leave the country altogether, and Somers shared the unpopularity that resulted, though, in fact, he was advising William in the contrary sense. He did, in fact, most noble service to his King. In August, 1693, after the defeat of Neerwinden, he went to the Guildhall and raised £300,000 for the continuance of hostilities. In 1694 he persuaded William to accept the Triennial Act. In the same year, after the death of Queen Mary, he brought about a reconciliation, more apparent than real, between the King and Princess Anne.

But, in the course of time, the nation began to weary of Whig Administrations. In 1698, as Somers reported, the people were "tired out with taxes" and showed "a strange spirit." He is credited with having prevented a dissolution in 1699, in which year a vote of censure was defeated. He was attacked by Davenant in the same year in a work entitled *Discourse on Grants and Resumptions*, which aimed with shrewd direction at the relations between the King and his Lord Chancellor. William exercised freely the right to make grants of the Royal domains, and, as we have seen, Somers had been one of the beneficiaries. The system of Crown grants had always been disliked. Even Jeffreys had criticized the freedom with which the Royal patrimony was dissipated. The practical result was that the deficiency in the Royal revenues had

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to be made up by taxation, and the people who paid the taxes felt, somewhat sensitively, that these lavish grants were at their expense. Looking backward over the centuries, one realizes the truth that Constitutional Monarchy really came about by reason of the need for taxation. The King and the Lord Chancellor acted on the assumption that the affixing of the Great Seal to these grants was a ministerial act, which could not be refused. Probably, as things then were, this view was correct ; but, in a period of transition towards Cabinet government, the practice ran counter to the trend of events. If limited to grants, it might stand scrutiny, though, even there, a legitimate object of criticism, but it went further. William concluded treaties without consulting his advisers and secured the affixing of the Great Seal, though his Lord Chancellor neither was aware of the contents, nor recorded the fact of the sealing. Such a practice could not consist with ministerial responsibility, then in the stage of embryonic development. Legally, the King could, as he still can, make such treaties as he pleases, but the practice was already otherwise. In the case of the First Partition Treaty, 1698, Somers had been asked to advise on the draft. He criticized it on the ground, which events showed to be fully justified, that it left too much to the honesty of Louis XIV. William, however, though shaken by the criticism, thought he could not in honour draw back, and, therefore, signed the Treaty. Both the Treaty and the ratification were sealed by Somers, without knowing the actual contents ; and neither was enrolled in Chancery. The same procedure was adopted with regard to the Second Partition Treaty of 1700, though here it is probable that Somers was never consulted at all. He was being violently attacked by the Country Party for his conduct in office, and that Party sought to implicate him in the piracies of Captain Kidd. Somers and others had formed an association, procuring a commission to Kidd to pursue



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pirates and to carry on trade. Instead of carrying out his duties, Captain Kidd, appraising the valuations a little wrongly, joined the pirates, and was eventually captured, tried and executed. His patrons lost heavily through his malpractices. The attacks on Somers in the Commons culminated in 1700 in an address to the King to exclude him from his counsels for ever. William desired Somers to resign, but he refused, lest resignation should be construed as an admission of that misconduct which he stoutly denied. But in April, 1700, the Great Seal was taken away and he never afterwards held judicial office.

The Commons were not appeased, and next year an impeachment was proposed. Somers asked leave to address the House, and did so on the 14th April, 1701, in a speech so cogent that his adversaries were forced to adjourn the debate to avoid defeat. It is said that they would not have succeeded even to that extent, but for a mistake in the tactics of his supporters. Harcourt made a speech reflecting upon Somers which Cowper answered so intemperately that heat was engendered and the debate was prolonged. Soon afterwards, the effect of Somers' speech having worn off, impeachment was voted. The managers produced fourteen charges ; six related to the Partition Treaties ; six alleged malversation in passing grants under the Great Seal ; one alleged complicity with Captain Kidd ; and one asserted that he had been guilty of delay in equity suits. The last two were manifestly unfounded. He was a heavy loser by Kidd's treachery, and he had impaired his health, as many Lord Chancellors have done, by discharging his judicial functions, while bearing heavy burdens in the administration of government. He countered with an effective reply, and the Commons became solicitous for an excuse to abandon the charges. This they found in a dispute with the Lords on a question of detail. They claimed to have an equal voice with the Lords in settling the procedure to be adopted. Constitutionally and pro-

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perly, this was not admitted, so, by way of protest, the Commons did not appear to support the impeachment, and Somers was acquitted on 17th June, 1701. To save their faces, the Lower House passed a resolution alleging that the Lords had been guilty of a denial of justice and had invaded the liberty of the subject. Their treatment of Somers led Lord Shrewsbury to remark, "Had I a son I would sooner bind him a cobbler than a courtier, and a hangman than a statesman." Within a fortnight, bland and undefeated, Somers was back at Court.

Sunderland had advised the King to consult the ex-Lord Chancellor as "the life, the soul and the spirit of the party." The old lawyer advised William to dissolve Parliament so as to take advantage of the reaction caused by Louis XIV's recognition of the Pretender on the death of James II, and is believed to have composed the King's Speech at the opening of the new Parliament on 30th September, 1701. War was inevitable, and William made on this, his last public utterance, a solemn and eloquent appeal to the patriotism of the nation. But before hostilities began the King died, on 8th March, 1702. And so there perished prematurely a stubborn, if harsh, personality which had played no small part in determining the Constitution, and even the destiny, of Great Britain. During the reign thus ended Somers had advanced in position from a rising young barrister to a tried and experienced statesman. He used his influence to encourage literature and the other arts, by a vigilant patronage which continued during his life. He offered to contribute towards the expenses of Bayle's work. He brought *virtu* and its *objets* into vogue. He was a member of the famous Kit-Cat Club and procured a very helpful pension for Addison. In 1699 he became President of the Royal Society, and held that office until 1704, when he was succeeded by Sir Isaac Newton. He assisted and encouraged Rymer and Madox, the antiquarians, and in

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minor ways became the *mæcenas* of that efflorescence of literature which made the reign of Queen Anne illustrious. He was even for a time friendly with Swift, who, in 1704, dedicated to him his *Tale of a Tub*, but the misanthrope afterwards quarrelled with, and made truculent attacks upon, his former friend.

The accession of Queen Anne for a time curtailed Somers' influence. He was excluded from the new Privy Council, but as a member of the Whig Junta he still had great weight, and, throughout the reign, supported the Protestant succession. He assisted to procure and defend the Act of Union with Scotland. He became a member of the Privy Council in 1705. On the 20th December, 1707, he carried a motion "that no peace could be honourable or safe which left any part of the Spanish Dominions in the hands of a Bourbon." This motion led to the fall of the Coalition in 1708, and the accession of its mover to office at the moment, or a little later, became inevitable. He was placed on a committee to examine a clerk named Gregg to see if any charge could be made against Harley. The inquiry proved a scandalous lack of care in the custody of secret documents, but did not yield any tangible charge against the Minister. In March, 1708, pressure was brought to bear on the Queen to readmit Somers to office, but he was her *bête noir* as a politician. She disliked him even more (and she had far more power) than Queen Victoria did Mr. Gladstone. It was not until 27th November, 1708, that the Queen yielded and Somers became Lord President of the Council. His want of means apparently had continued, and in 1709, and again in 1710, he received £1,000 from secret service money; payments plainly indefensible in the modern view. In 1710 he assisted Harley to eject Godolphin from the Ministry, and began to withdraw support from Marlborough. He ranged himself against the great soldier's refusal to give a regiment to Colonel Hill, the brother of

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Abigail Hill, who had supplanted the Duchess of Marlborough as the Queen's favourite. The Whigs were on the brink of dismissal, but Anne, paradoxically enough, now wished to retain Somers. He considered that he was bound to follow his friends into retirement, and on their fall he resigned on 19th September, 1710. He had, during the period, taken part in notable legal reforms, being the principal promoter of the statute for reforming legal procedure which was not superseded for over a century. He had supported the view of Holt in the debates on the Aylesbury election case, and voted for the reversal of the majority decision against Holt in the King's Bench. After 1710 party cleavage became more marked, and Somers was, for the first time, found supporting measures merely for factious purposes. Thus in 1713 he led the Whig attack on the Act of Union which he had done so much to bring about ; so formidable was the assault that the statute was only saved by the use of proxies. The Queen's health at this time was giving rise to anxiety, and the uncertainty of the succession led politicians of all parties to enter into communication with St. Germain. Although Somers had procured the statutes which ensured the Hanoverian succession, he was not exempt from the prevailing impulse to effect insurance, and he, too, established a Stuart liaison. "Who would not laugh if such a man there be ? Who would not weep if Atticus were he ?" Still, the accession of George I in 1714 brought him once again into power. He was sworn of the Privy Council and became a member of the Cabinet, though holding no office. He was granted a pension of £2,000, was appointed *Custos Rotulorum* of Worcestershire and a Commissioner to try Coronation claims. His health, which had caused serious misgivings from time to time, had been aggravated by anxiety, and he became so infirm that, for a long time before his death in 1716, he seldom left his residence. He was a bachelor, and the title, on his demise, became extinct.

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It is not easy to sum up his merits. He was a man beyond believing adroit and subtle, of vast erudition and culture, with incredible knowledge of affairs. His services in the difficult days of the Revolution, and the transition from the arbitrary personal government of James II to the Cabinet system which became the rule under George I, cannot be over-estimated. It is to him and to his colleagues of all parties that we owe the happy settlement of so many grave constitutional problems, which, because they exceeded the skill of the rulers under the Commonwealth, had produced (quite unnecessarily) a second Revolution. He was a master of close reasoning, capable of great eloquence, which was much assisted by his musical voice, but not a brilliant talker, nor able to shine conspicuously in social intercourse. As a rule, he was above party, though, in the course of years, the growing acerbity of political life led him on occasion to confuse party craft with statesmanship. His morals did not escape the breath of scandal. Few men who rise to high office ever do so escape ; and the reflections upon him, whether true or false, may be disregarded, for they did not in any way affect him as statesman or as judge. Though willing and even avid to acquire a sufficient fortune, he was neither selfish nor miserly, but was, on the contrary, a generous patron of the arts and sciences.

There is not sufficient material extant to judge of his early efforts at the Bar. When he appeared as junior for the Seven Bishops he was thirty-seven years old, and had been called twelve years. Many men have built up a substantial practice in that time. He was neither then inexperienced, nor was treated as being so by the Court. When he was forbidden further argument of the point that there was no proof of publication in Middlesex, the Lord Chief Justice was careful to put it on the ground that they would not hear a multiplicity of argument on a single point ; and to add that he was always willing to listen to

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Somers. His final speech was a model of what a short, clear statement of the defence should be. He cited the two recent and very relevant cases on the dispensing power, viz., *Thomas v. Sorrell* and *Godden v. Hales*, and then took the leading points of the indictment and gave his reasons for contending that they had not been established. His principal reason why the Bishops' petition to the King could not be a seditious libel was curious. It was because the petition was presented to the King in private and alone, and, therefore, could not have acted upon, or been intended for, the mind of any subject. The State trials in which he appeared as a Law Officer call for no special remark. He was throughout a competent and courteous prosecutor. In the Duke of Norfolk's case, already mentioned, he had to deal with a mass of revolting detail, and did so with restraint, even with delicacy.

His elevation to the Bench was generally approved. Evelyn commented that he was "a young lawyer of extraordinary merit." The first case of his that is reported in *Vernon* was heard on 10th March, 1693, (*Sheldon v. Donner*, 2 Vern. 311). The point was whether trustees were debarred by the terms of the trust from raising portions in a particular way. The Lord Keeper held that they were not, remarking: "Courts of Equity have always in the case of trusts taken the same rule of expounding trusts and of pursuing the intention of the parties therein as in cases of wills. . . ."

*Peyton v. Ayliffe*, (2 Vern. 312), arose on these facts. Sir Robert Peyton held the equity of a number of long leaseholds in the City. He was outlawed for high treason in James II's reign, and the leaseholds were seized into the King's hands and then granted to the defendant, who later obtained a transfer of the mortgage. Under William the outlawry was reversed. Ayliffe claimed that the leaseholds were his absolutely, but Somers held that he

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was merely mortgagee, and Peyton's executor was allowed to redeem.

In *Hale v. Hale*, (1693, Prec. Ch. 50), the Lord Keeper decided the rights of an unborn child. Property had been assigned to trustees upon trust to raise £1,500 for such child of A as should be living at his death. He died without issue, but his wife was enceinte of a daughter who was afterwards born alive. It was held that she was entitled to the £1,500.

*Pilkington v. Stanhope*, (1694, 2 Vern. 317), was an ordinary claim to redeem a mortgage. The defendant, however, was the British Ambassador in Spain, and he was held entitled to a stay until he returned from his embassy.

In *Harrison v. Forth*, (1695, Prec. Ch. 51), a point arose on the doctrine of notice. A had sold lands to B who had notice of certain incumbrances. B sold to C who had no notice, and C sold to D who had notice. The question was whether a purchaser with notice from a former purchaser without notice can claim to be treated as not having had notice. The Master of the Rolls said he could not, but, on appeal, Somers held that he could, and directed that an issue was to be tried to settle who actually had had notice.

In *Walsh v. Williams*, (1695, Prec. Ch. 54), he held that if a man dies intestate, leaving only nephews and nieces, they divided the personalty by heads and not by families (*per capita*, not *per stirpes*).

*Cary v. Bertie*, (1696, 2 Vern. 333), is an instance, then quite common, of the Lord Chancellor calling upon Common Law judges to sit with him. Holt and Treby, the two Lords Chief Justice, assisted in this case. A testator had devised property to trustees upon trust for his niece (who was also his heir-at-law) if, within three years, she married a named individual. If she did, then there were elaborate trusts for her, her husband and issue.

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If she did not, then the property was to be held for other persons. All three judges agreed that, as she had not married the particular individual within the time given, the property went away from her. Otherwise she would be better off by disobeying the condition. There was an appeal to the House of Lords, where the case was compromised.

*Bristol v. Hungerford*, (1697, Prec. Ch. 81), turned on a devise of freeholds to be sold to pay debts. The will directed that any surplus was to be paid to the executors, who were given legacies by another clause of the will. Lord Somers held that the executors must divide the surplus among the next-of-kin, taking the view that the direction to pay the executors merely meant that the heir-at-law was not to have the surplus.

*Stratton v. Grymes*, (1698, 2 Vern. 357), concerned a legacy to a daughter. The testator added a condition that if she married without her mother's consent £500 of the legacy was to go to someone else. She did marry without consent, and it was held that she lost the £500 because it was not a mere clause *in terrorem*, but there was an effective gift over.

*Bayley v. Powell*, (1698, 2 Vern. 362), also concerned gifts to executors. The will gave to the next-of-kin and to the executors by name certain legacies, but did not dispose of the residue. The Lord Chancellor decreed that it should go to the next-of-kin and not to the executors.

*Cowslad v. Cely*, (1698, Prec. Ch. 83), is only interesting because, on Lord Somers doubting whether a subpœna (writ in Chancery) could be served on a foreigner abroad, Mr. Hutchins mentioned that the Grand Duke of Tuscany had arrested the persons concerned in carrying out a commission issued by the Court for the examination of witnesses in the Grand Duke's dominions.

In *Kirk v. Webb*, (1698, Prec. Ch. 84), the Lord Chancellor held that if a trustee purchased lands for himself



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out of the profits of the trust they are not held in trust for the *cestui que trust*. This decision was affirmed in the House of Lords in 1699, but perhaps requires some qualification with distinction.

*Lawrence v. Lawrence*, (1699, 2 Vern. 365), is an illustration of the length of time for which litigation could in those days persist. A testator had by his will given a legacy to his wife, and had also devised part of his freeholds to her during widowhood. The rest of the freeholds he devised to someone else. In 1699 Lord Somers held that she must elect between the devise and her dower. He said, "Although what was given to the wife was not declared to be in lieu and satisfaction of dower, and although no estate for life was devised to her but only during widowhood, yet in equity it ought to be taken that what was so devised was intended to be in lieu and satisfaction of dower, and the intention collected from the will, because the lands were given to other uses." In 1702 Lord Keeper Wright reversed this decree. In 1715 Lord Chancellor Cowper refused to interfere again because the decree (of Wright, L.K.) had stood so long, and in 1717 an appeal to the House of Lords proved unsuccessful.

In *Allen v. Sayer*, (1699, 2 Vern. 368), Lord Somers laid down the rule that equity will not suffer an infant to be barred by laches of his trustees, nor to be barred of a trust estate during his infancy.

*Draper v. Borlace*, (1699, 2 Vern. 370), revealed a state of mind, I hope, unusual in a barrister. Mr. Hill, a practising member of the Bar, had advanced money upon a certain security. He was afterwards consulted by some people who were negotiating to advance money on the same security. He advised that that money should be lent and drew the mortgage deed, including in it a covenant "free from encumbrances." He omitted to mention his own security. He was held to be postponed to the mortgage of his clients. The Lord Chancellor said: "If he

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who only conceals his encumbrance shall be postponed, much more ought Mr. Hill who was entrusted as counsel by the mortgagees."

*Jackson v. Farrant*, (1699, Prec. Ch. 109), was a curious case where Lord Somers tried to supply an omission. A testator devised a portion to his daughter, to be paid at twenty-one, without saying anything about marriage. She married and died without attaining that age. The Lord Chancellor held that, nevertheless, the portion was due, marriage being the cause of portion. This decision was reversed in the House of Lords on the particular facts without prejudice to the general question. As the law stood at that day, I suspect that the Lord Chancellor was right.

In Somers' day the House of Lords sat as a whole to hear appeals, the convention whereby only such Lords as have special legal knowledge sit to hear appeals being undeveloped. He improved the arrangements for the judges to attend and give the House the benefit of their advice, and thereby greatly improved its efficiency as the ultimate Court of Appeal. As Lord High Steward he presided over the trials of the Earl of Warwick and of Lord Mohun for murder in a duel. He had already prosecuted the latter peer for the murder of Will Mountford.

I have left till the end the most important case that Somers decided, because it illustrates at once the strength and weakness of his legal knowledge. Under Charles II it had become the practice for the Government to obtain from the public, usually the goldsmiths, who were developing into bankers, short loans on security of the taxes or of the Crown revenues. The method was to give tallies and issue orders to the Exchequer to pay the principal and interest as a first charge upon the taxes or revenues hypothecated to meet them. These advances were a favourite means of temporary investment. In 1667 the King

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declared that he would not suffer on any occasion an interruption of payments. By an Act of Parliament, (19 Car. II, c. 12), these advances had been made transferable. In 1671, on the advice of Clifford, Charles II suspended the Exchequer payments. It is said that Shaftesbury conceived the idea, but let it out over a bottle of wine, so that Clifford, always alert, stole a march on him. It was announced as a temporary measure, but was continued for a long time. The profit to the State in 1672 was £1,328,526. The consequences to the public were disastrous. Many of the goldsmith-bankers were forced into bankruptcy, and many of their customers were ruined with them. In 1677 an attempt was made to put matters right by the grant of annuities. These were annuities in fee granted by letters patent under the Great Seal, and the annual amount was calculated at 6 per cent. of the moneys detained. The security was the hereditary revenue of the excise. Great care was taken to make the grants as binding as possible. They contained a covenant by the King for himself, his heirs and successors, that due payment should be made ; and that, if any defect should be found in the grant, the King or his successors would make a further grant ; and the Treasurer and his officers were directed to give the grantees the necessary tallies and to pay them. In 1683 payments ceased ; but no steps were taken to enforce the annuities until 1689, when, as Lord Somers suggested, it had become safe to sue the Crown. If the only remedy was a declaration obtained by petition of right it would not be of much use, as the annuities themselves were grants under the Great Seal. In *Wroth's Case*, (Plowd. 452), the Court of Exchequer had, on a petition, directed execution to issue by a writ commanding the treasurers and chamberlains of the Exchequer to pay the amount due. This precedent was now followed. Instead of a petition of right, the bankers presented a petition to the Barons of the Court of Exchequer.

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The Law Officers (Treby, A.G., and Somers, S.G.) filed a demurrer, which was overruled, and the Court gave the relief claimed. Then the matter was brought by error before the Lord Keeper, assisted by the Courts of King's Bench and Common Pleas. Somers had become Lord Keeper and Treby was Chief Justice of the Court of Common Pleas. The fact that both had taken part in the case as counsel for the Crown was not, in the practice of that day, considered to be a bar to their sitting on the appeal. The six puisne judges agreed with the Court of Exchequer, but none of these judgments has been preserved. In June, 1695, Treby, C.J., delivered an opinion in favour of the Crown, and this is reported, though not adequately. In November, 1695, Holt, C.J., delivered his opinion agreeing with the nine out of ten judges who had found against the Crown. It was in part a reply to Treby, and has been printed in two reports, though neither is very informative. Lord Somers took a long time to consider his judgment, which was not delivered until June, 1696. It is said that he spent (and this he must have disliked) several hundreds of pounds in searches and books in order to get to the bottom of the case. This judgment is the only one which has been preserved in full. He agreed with Treby, so that three judges held one way and ten the other. (One of the Barons of the Exchequer had taken the same view as Treby and Somers.) The question then arose whether the Lord Chancellor and the Lord Treasurer were concluded by the opinion of the majority in the Exchequer Chamber. The judges were consulted, and decided, by seven to three, that they were not so concluded. Upon that Lord Somers, there being no Lord Treasurer at the time, gave effect to his own opinion, and, reversing the Court of Exchequer, dismissed the petition. The matter was taken to the Lords, who reversed Somers' and restored the original judgment. Even this did not produce the desired result,

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and, eventually, the petitioners had to accept 10s. in the £ granted to them by 12 and 13 Will. III, c. 12, s. 15. The reasons given by the Lords were then never reported (reporting of Parliamentary proceedings being treated as a breach of privilege), so that the only material available is Holt's judgment to the same effect. There is a full account of the case in 14 State Trials at p. 1, where it is called *The Banker's Case*. Somers' action in this case was one of the grounds of his impeachment, but it is undoubted that he took the utmost pains to arrive at a right decision.

There were two points involved. The first was whether the King could alienate the hereditary revenues. All the judges agreed that he could. The second was a technical one, viz., whether the only remedy was a petition of right, or whether there was an alternative remedy by petition in the Court of Exchequer. It was on this second point that three judges were in favour of the Crown. Somers' very elaborate and learned discussion of the whole matter was summed up by him in three propositions, viz., (1) That no authors have ever mentioned any such remedy as was there suggested; (2) That there is no record to support its existence; and (3) That there is no authority in any law book to favour its existence. He sets out a vast number of cases and instances, and discusses their relevance to the matter. He dwelt upon one point which seems to be accurate historically. The Barons of the Court of Exchequer were inferior and subordinate to the officers of State against whom relief was sought. There can be little doubt that the contemplation of such a remedy would have astonished the early Exchequer officials. On the other hand, the Court of Exchequer had developed into a true judicial body, though the historical connection with the Exchequer or Treasury was preserved in a variety of ways. What would be unthinkable in a mere revenue court is not so extraordinary for one of His Majesty's Courts of Common Law. More-

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over, the purely historical view of the case obscured the fact that the right was admitted, the only dispute being whether there was any adequate means of redress, and it could not be denied that a petition of right, as it then existed, was an entirely illusory remedy. In *Ashby v. White*, Holt and Somers later agreed, upon an abstraction of profound importance, that where there was a right there was a remedy. As a piece of historical investigation, Somers' judgment is deserving of high praise and careful study, but as a contribution to the living science of law, the handmaiden of justice, it is inferior to Holt's. Both agreed that there was a wrong. They merely differed as to the remedy, but in the circumstances Somers' solution was derisory, giving no substantial relief. The case, however, has always been considered one of great weight, and wherever Holt and Somers agreed (and in the main they did agree) their authority has been held conclusive. Thus, in *Thomas v. The Queen*, (1874, L.R. 10, Q.B. 31), it was held, on their authority, that a petition of right (as remodelled under Queen Victoria) lay against the Crown to enforce payment of damages for breach of contract. The numerous suppliants who have availed themselves, and are availing themselves, of this remedy at the present time have to thank the memory of these two great judges for the right which they enjoy.

Somers did not seek to earn a reputation as a legal writer. Most of his writings which touch upon law are in the nature of political pamphlets, and to-day have only a historical interest. He did, however, form a great collection of tracts, records, and documents bearing upon English history and constitutional law. These passed into the possession of the Yorke family, and many were published under the title of *Somers' Tracts* from 1748 to 1752. A modern edition was brought out by Sir Walter Scott between 1809-1813. Unfortunately, most of Somers' manuscripts perished by a fire at the chambers

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of the Hon. Charles Yorke at Lincoln's Inn on 27th June, 1752.

His judicial career was short, far shorter than it would be now, since he resigned the Great Seal in 1700 and lived till 1716. In modern conditions he would have had the opportunity, during these years, of sitting to hear appeals in the House of Lords, often of presiding there and in the Privy Council, so that his judgments would have been available for the elucidation of difficult law. There are some indications that he did sit on such appeals, but there is no record of his judicial speeches on those occasions. We know that he supported Holt's decision in *Ashby v. White*. When he ceased to be Lord Chancellor, Evelyn wrote of him : " It is certain that this Lord Chancellor was a most excellent lawyer, very learned in all polite literature, a superior pen, master of a handsome style and of easy conversation ; but he is said to make too much haste to be rich, as his predecessors and most in place in this age did."

He was a great man who spent himself lavishly, and died worn out in the service of a nation which, on the whole, in his life and after death, did him justice.



THE RT. HON. PHILIP, EARL OF HARDWICKE  
LORD HIGH CHANCELLOR.

From the original of Ramsay in the Collection of The Right Hon the Earl of  
Hardwicke.





## THE EARL OF HARDWICKE

PHILIP YORKE, Earl of Hardwicke, achieved fame in one of the uninspired and, indeed, rather boring periods of English history. The Revolution Settlement had been attained. The task of statesmen was to associate with it the rule of unattractive Monarchs alien in origin and sentiment. The vices of the Restoration survived without the rosy glamour of the days of Charles II, and such romance as survived was given to the misfortune of the Jacobites. Men had lost faith, and sought to replace that loss by rather vague processes of reasoning. Those who had administered the affairs of the realm realized that the support of Parliament had become essential, but they had not learned how to earn and keep that support. They resorted to dark and squalid means of purchasing party allegiance, and in this ignoble atmosphere, paradoxically enough, the Cabinet system gradually gained strength.

Hardwicke is a signal instance of the gains which must be weighed in the balance of the argument against the patronage system. The Whig families, seeking for the support of ability, encouraged young men of promise. He justified that encouragement and, proving his capacity and responsibility, rose to the highest judicial office. The conditions of political life in his day gave him security of tenure, and thus, during his long occupation of the Woolsack, he was able to examine and nationalize the system of equity, carrying on the work of Nottingham, and thereafter enabling Eldon to complete the task. As a statesman he must bear the blame, just as he must share the credit, of the achievements of the Whig domination. For years

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he was a supporter of their policy, and for long he was one of their counsellors and associates.

The Yorkees were a family very respectably settled at Hannington in North Wiltshire, where they attained some prominence during the fifteenth and sixteenth centuries. One of their number settled at Dover, where his son, Philip Yorke, afterwards practised as an attorney. This Philip married a distant relation of Gibbon, the historian, and from this union sprang the Philip Yorke who is the subject of this sketch. He was born at Dover on 1st December, 1690, and was educated at a private school in Bethnal Green kept by one Samuel Morland, a good classical scholar. His pupil profited by his teaching, and showed during his judicial career an acquaintance with the classics, which not only stood him in good stead in the study of the civil law, but enabled him to point his judgments by apt quotation. Thus, in *Moore v. Moore*, (1737, 1 Atk. 272), after the Lord Chancellor had pronounced a decree in an embittered but unusual dispute between husband and wife, the Attorney General remarked that it was so uncommon a case that it would probably never occur again. Lord Hardwicke replied, "If you think so, you must have a very good idea of women ; for :

*In amore haec omnia insunt ; vitia, injuriae,  
Suspiciones, inimicitiae, induciae,  
Bellum, pax rursum."*

After school days, he spent two years in the office of an attorney in London, the brother of Serjeant Salkeld, a noted law reporter. There, when most of his contemporaries at the Bar were still at school or the University, he learned the routine and problems of a solicitor's office. At the end of that time he became, on 29th November, 1708, a student of the Middle Temple, and was called to the Bar on 27th May, 1715. Unlike most barristers, he did not remain faithful to his Inn. On 26th July, 1724,

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he migrated to Lincoln's Inn, where almost immediately he was elected a Bencher and very soon afterwards became Treasurer.

He had not long to wait for patronage or practice. An early introduction to Lord Chancellor Macclesfield led to his election in 1719 as Member for Lewes in the Pelham interest. In 1722 he was returned for Seaford, and continued to sit for that borough until he was raised to the peerage. The favour of the Chancellor secured him work at the Bar, and he was early elected to the Recordship of Dover, an office which, contrary to modern practice, he retained after he became a judge.

He was throughout his career a typical Whig, supporting the settlement of 1688 and the Hanoverian succession. His first great political speech was made on 4th March, 1720, in the course of the debates on the constitutional relationship of the Parliaments of England and Ireland. Soon after that speech he became Solicitor General and was knighted. As Solicitor General Sir Philip Yorke took part in the prosecution of Christopher Layer for high treason, and also, but not conspicuously, in the Atterbury trial. On 31st January, 1724, he became Attorney General at the moment when Raymond became Lord Chief Justice. One of his first tasks should have been to assist in the impeachment of Lord Macclesfield. He felt the difficulty of appearing against his friend and patron, and succeeded in obtaining permission to delegate the invidious duty to his Solicitor General. In April, 1725, he supported the Bill for Bolingbroke's restitution. In April, 1727, he added to his Parliamentary reputation by his defence of Walpole's financial measures. From time to time he gave powerful support to the Government by notable speeches. Among these were his orations on the Hessian and Swedish subsidies (1729), on the prohibition of foreign loans (1730), on the Army Estimates (1732), and on the Excise Bill (1733).

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One of his most important duties as Attorney General was to conduct State prosecutions. In that capacity he appeared against Curll for obscene libel (1727); against Woolston for blasphemy; against Hales for forgery of negotiable instruments (1728); against Bambridge and Huggins, ex-warders of Fleet Prison, for murder and extortion at that prison (1729); and against Francklin for seditious libel (1731). His behaviour in these cases won him a great reputation. Without conceding any point for the prosecution, he conducted the cases with justice and fairness, though in some of these trials his view of the law would not commend itself to present ideas. He had by this time acquired a commanding position at the Bar and was regarded as the foremost advocate and lawyer of his day. Even Talbot, who became a Lord Chancellor of outstanding merit, was admittedly his forensic inferior.

On 18th March, 1733, Raymond, Lord Chief Justice of the Court of King's Bench, died. The office was offered to Yorke, who was in no hurry to accept it, or indeed anything else. Eventually, on 31st October of that year, he received the appointment at a salary of £4,000 a year (double that which Raymond had enjoyed). He was also sworn of the Privy Council and created Baron Hardwicke. Not for long afterwards was his office considered to be incompatible with active political life, and on 28th March, 1734, he made a very considerable speech in support of the augmentation of the Forces. On 29th March, 1735, he was elected Recorder of Gloucester, a curious office for the Lord Chief Justice. In 1736 he supported, with some reservations, the Mortmain Act which revised the old law concerning the ownership of land by corporations and charities. In 1737 he drafted the Bills prepared to deal with the situation in Edinburgh as a result of the Porteous Riot, but the Statute, as ultimately passed, was milder than his draft, though still severe. Talbot, who had become

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Lord Chancellor, was ailing, and Hardwicke frequently acted as Deputy Speaker in the House of Lords. As such, he would be responsible for the conduct of much of the Government business in that House. In 1737, however, Talbot resigned. Again Hardwicke delayed his acceptance of the Woolsack until a lucrative place had been provided for his son, and even then he remained Lord Chief Justice for a time.

Almost his first duty as Lord Chancellor was to convey to Frederick Prince of Wales the angry and insulting message of George II, breaking off relations between them. He made efforts to induce the choleric monarch to modify his language, but failed. By this time he had attained a commanding position in the Government. He usually drafted the King's Speeches. He was a member of the Council of Regency appointed for the King's frequent absences abroad and was much occupied with foreign affairs. He revised the Spanish Convention in 1738. During the '45 rising he took an accurate measure of the emergency, neither exaggerating nor minimizing its importance. He took proper steps to meet the Scottish invaders and to crush the rebellion. After its collapse he presided as Lord High Steward over the trials of the Jacobite peers. At the same time he was busily engaged on the measures laid before Parliament to suppress the Scottish clans. Some of the provisions, such as prohibiting the wearing of the kilt and tartans, were hardly required, but in the main they were successful, and Hardwicke is entitled to credit for such of them as have conduced to the present loyalty and prosperity of Scotland.

In 1751 he supported the reform of the calendar by the adoption of the Gregorian for the Julian system. This reform brought the United Kingdom into line with Western Christendom. His great legislative achievement was the passing of the Marriage Act, 1753, usually known as Lord Hardwicke's Act. It had been long in contemplation.

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When Lord Chief Justice he had denounced the scandal of irregular mariages, and in 1741 he had stated, in the course of a judgment, that legislation was projected.

Up to this time a marriage, valid for all purposes, could be celebrated before a priest at any time and at any place without any previous notice and without the consent of parent or guardian, provided only the parties had attained the legal age for marriage (fourteen for a male, twelve for a female). Abuses had crept in and the infamous practice of Fleet marriages had been a scandal for years. A number of the Fleet parsons had never been ordained, and the records of all of them were suspect. Most were believed, and with reason, to be capable of adding entries or tearing leaves out of their books if sufficient pecuniary inducements were forthcoming. The previous remedy had been to impose penalties on the clergyman and the husband, but, as the proceedings could be spun out for years and be made outrageously expensive, few had the courage and pertinacity to embark on them. Lord Hardwicke cut at the root of the evil, by declaring all marriages to be invalid unless celebrated after banns or a prescribed licence had been obtained. Parsons celebrating such invalid marriages were rendered liable to transportation. Special provision was made for Jews and Quakers, but other Dissenters had to wait many years for exemption from Church marriage. The measure, though purely secular, was in harmony with the canons and the rubric. It was supported by the Bishops and all right-minded clergy and laity, and, indeed, the necessity for it was obvious. At first a number of practitioners defied the law, but they soon found that defiance did not pay. The last was a Mr. Wilkinson, a clergyman, whose conviction David Garrick procured in 1756. Thereafter, eloping couples were forced to flee to Gretna Green or to some other spot near England where the law was more favourable to lovers. Although successful in its main purpose, the Act was not a model of drafting,

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and from time to time its defects were remedied by amending Statutes. At last, in 1823, the present system was adopted, but Lord Hardwicke's Act laid down the main principles which still govern marriages in church.

On 2nd April, 1754, he was given a step in the peerage and became Earl of Hardwicke. Eventually, on 19th November, 1756, he resigned during the crisis which followed the loss of Minorca, an event which led to the trial and execution of Admiral Byng.

When, in 1760, George III ascended the throne, Hardwicke was sworn of the new Privy Council, and he drafted the King's first Speech. The celebrated sentence "Born and bred in this country, I glory in the name of Briton," was not in the draft; King George added it himself. At this period Hardwicke was uncertain in his political allegiance. He deserted Pitt for Bute, and then again deserted Bute for Pitt. He opposed the Government over the Peace of Paris which put an end to the Seven Years' War, and it is said that he favoured Lord Bath's proposal to hand Canada back to France. In the "Wilkes and Liberty" disputes he was opposed to the Government's use of general warrants, but his ill-health prevented him from making any public announcement. He was no friend of Wilkes' publications, or, indeed, of the liberty of the Press, as he showed by his remarks in *Francklin's* case in 1731. He held firmly to the view of the judges that in libel the jury were confined to the fact of publication. It needed Fox's Libel Act to overcome the view of the lawyers on this point.

After 1762 Hardwicke's health, never very robust, was distinctly failing, and he died on 6th March, 1764.

He had married on 16th May, 1719, Margaret, daughter of Charles Cocks, a relative of Lord Somers, and left a numerous family. Some of them attained eminence, and none of them had cause to complain of their father's efforts to obtain them lucrative places.



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During his life he had held, in addition to his judicial offices, many important public positions. He was Governor of Greenwich Hospital, of the Charterhouse, and of the Foundling Hospital, High Steward of Cambridge University and of the City of Bristol, and a Fellow of the Royal Society.

He was handsome in person, agreeable in manner, eloquent in speech. His oratory was celebrated. The excellence of the matter and of the form was heightened by the music of his voice and by his persuasive charm.

Politically, as I have said, he stood for the Constitution of 1688 and for all that it implied. He was a supporter of Walpole and the Pelhams, and must quite plainly have been cognizant of the murkier side of their methods. He cannot have been too scrupulous. Eager to provide his progeny with lucrative sinecures, he continued his old friendship with Lord Macclesfield, after the Lord Chancellor's sales of office had been brought home to him. But no suspicion of corruptibility had ever been cast upon Hardwicke's character, either as judge or as an individual. It has been said that he was opposed to legal reform. Henry Fox said of him, "Touch but a cobweb of Westminster Hall and the old spider of the law is out upon you with all his younger vermin at his heels." He was not, however, a really uncompromising opponent of law reform. His judgments show that he was not unmindful of defects of the law, and sometimes he suggested that remedial legislation was necessary. But a man who was engaged in rationalizing the principles of equity into a system could not have been over-inclined to legislative reform of the very work which he was fashioning anew for the use of mankind. Such Statutes might hinder or render nugatory all his efforts. He was by temperament a rationalizer, not an innovator. The transformation of equity into a working code in harmony with the ideas of men of intellect and position would have been impossible unless he had been

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given time for the task. Most Chancellors held, and hold, office for too short a period. Their judicial work was, unlike that of the modern Lord Chancellors, chiefly as a judge of first instance in the Court of Chancery. In the House of Lords he was merely Speaker, and the lay lords still attended the hearing of appeals. Few appeals were ever brought against Lord Hardwicke's decisions, but this may well be due to the fact that for the most part he was the only lawyer in the Lords and presided over the hearings. His legal career followed the accepted lines. Early successful as an advocate, acceptable as a politician, he became a law officer and then a judge. But few have been both Lord Chief Justice and Lord Chancellor.

First, then, consider him as a practising lawyer. It is said, and probably with truth, that Lord Macclesfield's favour made his fortune at the Chancery Bar. But it cannot be the whole secret of his success. It was good fortune, indeed, to obtain an early start, but Hardwicke's practice was not confined to Lord Macclesfield's Court. He practised and won the foremost place in all the superior Courts, both of law and of equity, and such a feat could only have been accomplished by a man who was a great lawyer and a great advocate. His conduct of criminal cases—a class of practice which, except as a law officer, he did not usually accept—shows that he was courteous but not inclined to concede any point. In Christopher Layer's case, 1722, he was with the Attorney General for the prosecution. The charge was high treason by conspiracy to bring in the Old Pretender. The prisoner, when brought up to plead, complained that he was fettered. Yorke said that the complaint was only to captivate bystanders. It was, he contended, the usual practice in treason cases, and, besides, the prisoner had escaped once by climbing out of a window two pairs of stairs high and from thence fled over the water to Southwark. Hungerford, who led for the defence, quoted Lord Holt's practice.

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The Court ruled that that precedent only applied to the trial, as in that case trial followed immediately after the plea. So the prisoner pleaded in chains. Later, when he came up for trial, the prisoner was still fettered. The Court was angry. The Lord Chief Justice said that they would not stir until the irons were taken off, and that should have been done before the prisoner came to the bar. When, after conviction, Laver was brought up for sentence, he was again in chains, and the Court ordered them to be taken off. Yorke took a prominent part in the trial and made the final speech for the prosecution. The speech lasted two hours and sealed the prisoner's fate. Hungerford suggested that the conclusion was copied from Finch's speech in Algernon Sydney's case. Innumerable technical objections were taken on the prisoner's behalf, but Yorke showed that he was thoroughly capable of dealing with them. Laver was executed on 17th May, 1723.

*Curl's Case*, 1727, is an important case on those indefinite offences against public morals which sometimes give rise to scandal. It had been supposed that the law as to misdemeanours was fixed, but in Sir Charles Sedley's case, in the reign of Charles II, it had been held that indecent exposure was a misdemeanour, though there were no clear precedents. Curl was indicted for an obscene libel, the charge being based upon the publishing of an indecent book entitled *Venus in the Cloister, or The Nun in her Smock*. Objection was taken that offences against public or private morals were not the subject of the criminal law, but were relegated to the Ecclesiastical Courts. Counsel mentioned that the run of filthy books in Charles II's reign did not give rise to a single prosecution, and that in Holt's time a man named Read was prosecuted for publishing a book entitled *The Fifteen Plagues of a Maidenhead*, but the Lord Chief Justice then was opposed to it and the prosecution dropped. Yorke's reply was characteristic. He said that offences against the peace included offences against good

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order and government. These latter were to be classed as offences (a) against the Government, (b) against religion, and (c) against morality. Holt used to say that "Christianity was a part of the law"; why not morality too? He then cited *Sedley's Case*, (1 Sid. 168), and *Hill's Case*, under William III, where the defendant on being indicted for publishing Lord Rochester's poems absconded and was outlawed. *Read's Case* went off because Holt had said "Why don't you go to the Spiritual Court?" After consideration, the Court held that an obscene libel was a misdemeanour. Curll was convicted and sentenced to be pilloried. The artful scoundrel spread the report that he was being punished for maintaining the memory of Queen Anne, and the mob turned his disgrace into a popular ovation!

*Woolston's Case*, 1728, was a trial for blasphemy, and is chiefly remarkable for the emphatic way in which the Court insisted that any attack on Christianity, however reasoned and temperate, was blasphemy. Yorke prosecuted.

Hales was a goldsmith who was tried at the Old Bailey in December, 1728, and January, 1729, on a number of indictments charging him with forgery of negotiable instruments. On two indictments a clergyman named Kynnersley was charged with him. Yorke prosecuted. The prisoners were convicted, but neither lived to serve his full sentence. Hales died in February and Kynnersley in April, 1729. Hales had been twenty years a bankrupt. In the same year Yorke prosecuted Huggins and Bambridge, warders of Fleet Prison, for robbery and murder upon persons in their custody for debt. The circumstances showed that the unfortunate debtors were fleeced and maltreated in the most callous manner. One had been deliberately forced into a house where smallpox was raging, and died of the disease. The prisoners were acquitted, as was Acton, the keeper of the Marshalsea, who was tried at Kingston Assizes on several indictments for murder.

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The probable explanation of the acquittals was that the witnesses were suborned to commit perjury, and that the jury were practised upon. Prisons were then a national disgrace, but prisoners sometimes took a gruesome revenge by infecting the court with gaol fever. In 1730 Pengelly, L.C.B., who had presided at the above trial of Hales, died of it while on the Western Circuit, together with the High Sheriff of Somerset and many others. It is not easy to describe Yorke's advocacy in his proper sphere. There were no shorthand notes except in noted Crown cases, and his chief work lay in "heavy" cases without much human interest. Still, it is some indication of his merits that he was *facile princeps* at the Bar, where no man can escape the keenest competition and the frankest criticism.

When in 1733 he became Lord Chief Justice, he had been "called" eighteen years, but during that period he had been heavily engaged in litigation and in Parliament. A diligent perusal of the decisions given during his four years of office does not give much assistance in judging his merits. No cases or points of great outstanding interest fell to be decided, and he was mostly confined to the dull squabbles and technicalities which formed the daily life of the Court of King's Bench. He was patient, diligent in studying precedent, and always ready to take time for consideration. On a number of occasions he mentions that he had in the interval consulted the other Courts. An early case before him was *Rex v. Tallard*, (1733, 2 Barn. K.B. 328, 346). The prisoner was charged with indecency in that he had induced one Hacon to run in Chapel Field, Norwich, while stripped to the waist. The Court quashed the indictment, but it was re-argued, and, on the second occasion, Hardwicke accepted the contention that the law could not hold that indecent, inasmuch as men were often sentenced to be publicly stripped and whipped. In the same year, in *Rex v. Earbury*, (2 Barn. K.B. 346), he raised, but deemed it unnecessary to decide,

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the question whether a Secretary of State could lawfully issue a warrant to seize papers. In 1734 he held, after prolonged arguments and discussions with all the judges, that a Member of Parliament was privileged from arrest for debt for a reasonable time after a dissolution, (*Holiday v. Col. Pitt*, Cunningham 16). He also expressed a view as to Charles II's *Quo Warranto* proceedings in *Rex v. Wynn*, (2 Barn. K.B. 390), a case concerning the charters of Chester, saying that he "never knew these sort of charters in King Charles II and King James II's time mentioned by the judges but with censure." In *Rex v. Reffit*, (1734, Cunningham 36), on an indictment for extortion, he ruled that Coke's *Institutes* were good authorities as to matters of law, but were no legal evidence of the historical facts mentioned in them. *Rex v. Francis*, (1735, 2 Str. 1015), is a case illustrating the strictness of criminal law. The prosecutor, Cox, while riding to Somerton Fair, had been tricked into taking money from his pocket, and Francis knocked it out of his hand. The prisoners seized the money and made off. Cox followed, and was threatened with death. On an indictment for robbery the jury set out the facts in a special verdict, but omitted to say in so many words that Cox was there when the money was stolen. Hardwicke and the majority found that there was no finding that he was there, and discharged the prisoners from the indictment, but directed them to be taken back to Somerset for trial on a new indictment for theft. At the next Assizes they were convicted of felony and transported. In *Jasper v. Grosvenor*, (1735, Cun. 50), he had to deal with a defendant who was too ill to speak or write. He gave further time for pleading, but cited a precedent which showed that the real remedy was to sue out a commission in Chancery and so obtain the appointment of a person to defend for him. In *Cruichfield v. Luckman*, (1735, Cun. 97), he held that the privilege of Ambassadors and their servants did not extend to such servants as were also traders or merchants.

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In the same year, in *Rex v. Reading*, (Cun. 140), he ruled that a wife could not give evidence of non-access to bastardize her child. In *Stoughton v. Reynolds*, (1736, 2 Str. 1046), he decided that a vestry meeting to elect the people's warden could only be adjourned by vote of the meeting. In 1737 he was concerned in two cases of great importance. In the first, *Middleton v. Croft*, (2 Str. 1056), a husband and wife asked for a prohibition, having been cited to appear in an Ecclesiastical Court on a charge of clandestine marriage. The ground was that they were laity and not bound by the canons prescribing banns or licence, and, further, that the Act of William had made it a secular offence. The case was argued several times, and all the judges were consulted. Hardwicke ruled that laymen were not bound by the canons of 1603. Since the Reformation all new law had to be made by Statute. But the received canons existing before then had been sanctioned by Statute of Henry III, and the rubric prescribing banns had been confirmed by the Acts of Uniformity. The Statute of William had not superseded the ecclesiastical offence, and, indeed, imposed no penalty on the woman. He related how Coke had, in Elizabeth's reign, been married clandestinely in the presence of Lord Burghley, the Lord Chancellor, and other legal dignitaries, and they all had been absolved from excommunication on the ground that they acted in ignorance of the law. He denounced the growing evil of clandestine marriages, which later he was destined to scotch by his Marriage Act. The decision left the spouses amenable to the ecclesiastical jurisdiction, but in the meantime the husband had died, and the suit against the wife was dropped.

In the other case, (*Boyfield v. Brown*, 2 Str. 1065), on a claim on an insurance policy on corn, he directed the jury that when the salvage fell short of the freight it was a total loss. In consequence of this the underwriters, in 1749, devised the familiar clause, "corn, fish, salt, fruit, flour, and seed, are warranted free from average unless general or

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the ship be stranded," which, in a modified form, still figures in policies of marine insurance. It was held in *Mason v. Skerry*, in 1780, that the clause was effective to prevent liability for such a loss. Although he did not resign immediately on becoming Lord Chancellor, he appears to have presided in the King's Bench once only, to hear a motion by Strange. Until his successor was appointed, the puisne judges carried on as in the case of a vacancy. These cases show that he was a capable Lord Chief Justice, but they do not differentiate him from many other Chief Justices who have not earned posthumous fame. The task which he performed in Chancery he left to Lord Mansfield in the realm of common law. Hardwicke's claim rests upon his judicial work in Chancery.

He remained on the Woolsack for nearly twenty years, and during that period he examined and formulated nearly all the rules of equity, transforming it from a haphazard collection of rules, some well developed and others hardly yet perceived, into a true system of jurisprudence. He came to office at a period when equity was ripe for such a change, and he himself was not only capable of doing the work but willing to do it. This is not to belittle the work of his predecessors. The system of the Court of Chancery had been gradually evolved by the efforts of many men of great ability to redress the hardships of the common law. Starting from redress of particular griefs it had been gradually evolving principles, many of which had been expressed in forms of maxims, but others remained buried in the decrees of bygone cases. A regular jurisdiction naturally gives birth to a course of practice, and experience shows how far a remedy may be effective or merely specious. On the other hand, the Lord Chancellor was a constantly changing individual, and may have had no experience whatever of equity. Some held office for too short a period ; others took little interest in their judicial work ; and there were a number of mediocre Chancellors whose well-meaning efforts



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meant at best a marking of time. Selden had remarked that equity varied "with the length of the Chancellor's foot," but the work of centuries had produced a large body of rules which only required the hand of a master to form into a noble structure. Much had been done by Nottingham. After his day the law reporters had found that equity reports were needed, and precedent began to lay a steadying hand upon the administration of equity, though not so heavily as in the Courts of Common Law. The idea that equity exists to correct the hardships caused by strict adherence to rules still prevailed, and, indeed, is inherent in the minds of laymen to this day. Lord Hardwicke hastened the process. His restatement of the basic principles of equity, harmonizing the precedents with the philosophic notions of his age, almost completed the system. After his day it was possible to advise with some confidence on the probable result of a Chancery suit. He was accustomed to ascertain what questions arose in the cases before him, and then to examine whether the principles to be drawn from the precedents afforded a solution. Often the precedents consisted merely of the record of the proceedings, with no clue as to the reasons which had led to the decree. Sometimes a report was available, and then the reasoning could be followed, though too often in those days the report was inaccurate. Where no guidance could be had from precedent, there was always the Roman Law and the modern systems based on that law. The reports diligently gathered these decisions and made them accessible to practitioners. Not all Hardwicke's judgments have survived subsequent judicial examination, but it is a noteworthy fact that even now the last edition of White and Tudor's *Leading Cases in Equity* still retains ten of Lord Hardwicke's decisions to illustrate the leading principles of equity. Apart from these ten, hundreds of his judgments have become embodied in the very structure of equity and are followed every day in confident reliance upon their inherent justice.

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I will deal first with *Casborne v. Scarfe*, (1737, 1 Atk. 603 ; 1 W. and T. 6), which illustrates the way in which equity follows the law, but also shows how it modifies the rigour of the old common law. A spinster mortgaged her lands and then married. Her husband survived her. At her death the mortgage still subsisted. At common law a mortgage was a conveyance outright with a right within a limited time to call for a reconveyance, but in equity it was always a security for the money and the mortgagor had an equity of redemption. This equitable right, said Lord Hardwicke, was an estate in the land, and, as equity follows the law, the husband was entitled in equity to a life estate by courtesy in the same way as he would have had at law if there had been no mortgage.

*Stapilton v. Stapilton*, (1739, 2 Atk. 1 ; 1 W. and T. 234), lays down the important principle that the compromise of a doubtful right is a good consideration for an agreement. Two brothers had been induced by their parents to agree to a division of the estates which would come to them from their father. After the death, the younger son attempted to set aside the arrangement on the ground that the other had no rights to compromise, he being illegitimate. It was proved that, though the husband and wife were believed to have been married the whole time, the elder son was, in fact, born out of wedlock. Lord Hardwicke upheld the arrangement, remarking that the Court would, if possible, decree performance of agreements to save the honour of a family, if the agreements were reasonable.

*Elliott v. Merryman*, (1740, Barn. Ch. 78 ; 2 W. and T. 913), leads to two topics of equity : first, the duty of a purchaser to see to the due application of the purchase money, a subject upon which there has been subsequent legislation ; secondly, to the implication of a power of sale where land is devised to trustees charged with the payment of the testator's debts. A testator had devised lands to

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trustees, charging the property with payment of his debts. The trustees sold the land, and the questions arose whether they were empowered to sell and whether the purchaser was bound to see that the purchase money was duly applied in payment of those debts. Lord Hardwicke pointed out that there were two established principles : (1) that, where lands were devised to be sold for payment of debts generally, the purchaser need not inquire whether the debts were paid ; (2) that, where lands are devised to be sold for payment of particular specified debts, then the purchaser was bound to inquire. He held that, the charge being for payment of debts generally, the first principle applied.

*Le Neve v. Le Neve*, (1747, Amb. 436 ; 2 W. and T. 187), shows how equity will prevent even a Statute from working injustice. Deeds relating to lands in Middlesex must be registered under several Statutes passed to establish the system, avowedly to prevent secret conveyances. In the case in question, land in Middlesex had been settled by an unregistered marriage settlement. On a second marriage of the settler another marriage settlement was executed, and this one was duly registered, but the parties all had notice of the former settlement. Under the Act the legal estate passed under the second deed, but Lord Hardwicke held that the equities were not dealt with by the Act, and, consequently, the legal owners, having had notice of the former deed, must in equity give effect to its provisions. He further held that notice to the agent or trustee acting in the matter bound the principal, even if he personally had no notice.

*Row v. Dawson*, (1749, 1 Ves. Sr. 331 ; 1 W. and T. 95), illustrates the way in which equity favoured the assignment of rights where the law did not permit it. A loan was secured by a draft on a fund due from the Exchequer. This draft was deposited with the proper official at the Exchequer, so that the parties had done all that they

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could, to make the transfer effective. Then the borrower went bankrupt. Lord Hardwicke held that the lender's security was good in equity, and also laid down the important principle that no particular form is required for an equitable assignment.

*Ryall v. Rowles*, (1750, 1 Ves. Sr. 348 ; 1 W. and T. 98), on the other hand shows that equity will not facilitate transactions which may lead to fraud. Harvest, a brewer, had raised money six times on the security of his stock-in-trade, book debts, etc., but he had remained in possession of the chattels and continued to receive payment of the debts without any control over him by the various mortgagees. Eventually he went bankrupt, and the mortgagees claimed the benefit of their securities. Lord Hardwicke considered the statutes and the authorities, and deduced the principle that, if a trader assigns chattels but continues in appearance to have the ownership of them, then the legal estate of the assignee will not prevail against the unsecured creditors. The topic is now covered by subsequent legislation based upon this principle.

*Penn v. Baltimore*, (1750, 1 Ves. Sr. 444 ; 1 W. and T. 800), is one of the great cases of equity. It illustrates the maxim "Equity acts *in personam*." The dispute was as to the boundaries of Pennsylvania and Maryland. The parties were in England and the claim arose on an agreement which the plaintiff sought to enforce. The objection was made that the subject matter was out of the jurisdiction. Lord Hardwicke decided that the Court of Chancery acted by way of compelling the individual to do equity, and, as he was in England, the Court clearly had jurisdiction. Nevertheless, the Court would not interfere unless there was some equity against defendant, and even then would not compel him to do anything which was forbidden by the law of the country where the land in question was situated.

*Garth v. Cotton*, (1750, 1 Ves. Sr. 524, 546 ; 2 W. and T. 992). The plaintiff's father had a lease of land for

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ninety-nine years if he should so long live, but was not impeachable for waste except voluntary waste. Subject to his interest, the land was given to trustees to protect contingent remainders which were declared in favour of his first and other sons successively in tail with an ultimate remainder to Cotton. The life tenant had been married for many years and had no children. Thinking there never would be any, he agreed with Cotton, who would in that event be the only other person interested, that they should cut down the timber and divide the proceeds, and this was done. Afterwards, the life tenant's wife died; and he married again and had a son, the plaintiff, who succeeded to the estates and disentailed them. He then sued Cotton's executors for his share of the timber money. The basis of the claim was the existence of trustees to preserve contingent remainders. Lord Hardwicke examined the whole law relating to such trustees and the rights of the unborn children, and finally decided that Cotton had no right to the money, and ordered it to be refunded. Cutting timber is voluntary waste.

*Earl of Chesterfield v. Sir Abraham Janssen*, (1750, 2 Ves. Sr. 125 ; 1 W. and T. 303), turns on the principles upon which equity will give relief in cases of fraud, and will relieve expectant heirs against unconscionable bargains. John Spencer was the grandson of the great Duchess of Marlborough, from whom he had expectations which were ultimately realized. When he was thirty, he borrowed £5,000, giving a bond with a penalty of £20,000 with the condition that he would pay £10,000 on the Duchess's death. He survived her and then received back the bond, giving another with the same penalty, but conditioned a payment of £10,000 at a fixed date. He died shortly afterwards, and his executors tried to avoid the bond. Lord Hardwicke's decision was merely that the bargain was not usurious and that it was unnecessary to decide the question whether it was an unconscionable bargain with an expectant heir, inasmuch as the deceased, a man of mature

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years, had confirmed the transaction after he had inherited. He, however, seized the opportunity to examine and restate the principles on which the Court of Chancery acted in giving relief against fraud and unconscionable bargains. The arguments of counsel and the judgment were celebrated at the time for their learning and complete mastery of the issues.

*Ward v. Turner*, (1752, 2 Ves. Sr. 431 ; 1 W. and T. 413), contains Lord Hardwicke's review of the principles governing gifts in contemplation of death. A man sometimes, feeling that he is in danger of death, gives something away in such a fashion that if he recovers he is to have it back, but if he dies then the recipient is to keep it. He does not give it by will. Lord Hardwicke decided that such a gift is only valid if the thing is handed over to the recipient at the time. If it is merely promised, then the gift can only be made valid by will, and equity will not aid an imperfect testamentary intention. In the case in question the deceased had handed over some receipts for South Sea annuities, but the conditions of transfer made the transaction one not binding on the deceased, who could still deal with the annuities as he pleased, and so the gift was held to be invalid.

There are some other cases he decided of general interest. *Pope v. Curl*, (1741, 2 Atk. 342), was an attempt by Curl, the publisher already mentioned, to induce Lord Hardwicke to dissolve the injunction obtained by Pope restraining him from publishing a book entitled *Letters from Swift, Pope and Others*. Lord Hardwicke discussed the effect of the Copyright Act of Queen Anne, and also the vexed question of copyright in letters. He held that though the recipient of a letter became the owner of the document, that did not entitle him to publish the letter without the writer's consent. In the end, he continued the injunction, but only as to letters written by Pope and not as to those written to him.

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In *Robinson v. Cummings*, (1742, 2 Atk. 409), he made observations upon lovers' gifts. He observed that if a man who is making address to a lady with a view to marriage with a reasonable prospect of success makes presents to her, then, if the lady deceives him, she must return them. But where a man makes gifts to introduce him to a lady's acquaintance he is to be looked on as an adventurer, and if he loses by the attempt he must take it for his pains.

*Da Costa v. De Pas*, (1754, Amb. 228 ; 2 Swanst. 487), is a decision on a state of the law long since past, and might have been thought long since obsolete. But in the "Masses Case," (*Bourne v. Keane*, 1919, A.C. 815), it became necessary to review this among other authorities. The testator had left a legacy to establish a Jesuba or assembly for reading the Law and giving instruction in the Jewish religion. Lord Hardwicke held that the gift was invalid, but, as a charitable gift, must be applied to lawful charitable objects. The bulk of the money was given to the Foundling Hospital, of which Lord Hardwicke was a Governor. It was supposed to be an authority that such gifts were forbidden by the Chantry Act, 1547, but on examination it was found to be explicable on other and more intelligible grounds. Such a gift would now be upheld. The case illustrates also the danger to a judge's reputation from the inaccuracy of the old reporters. Lord Eldon had access to Lord Hardwicke's notes and found that the report in Ambler was inaccurate. Swanston, many years after Hardwicke's death, supplied a corrected report from Cox's notes in Lincoln's Inn Library.

*Newstead v. Searle*, (1737, 1 Atk. 265), was one of the earliest of Hardwicke's decisions. A widow with children being about to contract a second marriage, made a settlement with her intended second husband in consideration of their marriage. By the deed she conveyed property to trustees for her children, both those she had and those she might have. There were, however, no children by the second marriage.

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The Lord Chancellor held that the disposition of the property was binding upon subsequent purchasers and creditors. Otherwise, he observed, no widow on remarriage could make provision for her existing children. There was no Married Woman's Property Act in those days.

*Omychund v. Barker*, (1744, 1 Atk. 22), is a good example of his rationalism and of his care to examine and have regard to precedent. A suit before him had necessitated a commission to India to take depositions. Some of the witnesses were of the Gentoo religion, and had been sworn according to their ceremonies. The difficulty was that the precedents suggested that only a Christian could take an oath recognized by the Courts in England. They were argued at length, and ultimately the Lord Chancellor, assisted by the precedents of two of the Courts of Common Law, was able to extract from them the principle that an oath administered in a form binding upon the conscience of a witness was valid. Atheists remained outside the pale.

But no extracts or summaries of these reported cases can give a just idea of his mastery of the art of marshalling authorities and extracting the principles underlying them, or of the sincerity with which he strove to be accurate and informative. No case was to him a matter to be decided on first impression and then forgotten. Somewhere a principle existed which would determine the issues, and he sought for that principle until he found it. The case served as a means of formulating, or, at least, of illustrating, a principle, and thereafter remained as a guide or warning to posterity.

As Lord High Steward, Hardwicke presided over the House of Lords at the trial of the Earls of Kilmarnock and Cromarty and Lord Balmerino in 1746 for their share in the '45. Kilmarnock and Cromarty pleaded guilty. Balmerino objected to plead, as he wanted to take certain points. The first was that he was indicted as "Arthur Lord Balmerino of Carlisle in the County of Cumberland,"



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and he was not of "Carlisle." Lord Hardwicke overruled this objection on the ground that the addition was mere surplusage. The prisoner then objected that he was not at the taking of Carlisle as charged. Lord Hardwicke ruled that the objection was premature; it could only arise after the evidence had been given. The prisoner thought that the objection was overruled, but Hardwicke patiently explained the effect of his ruling. Lord Balmerino then pleaded not guilty. The evidence showed that he marched into Carlisle after the surrender. The point was then raised and overruled, whereon Lord Balmerino said that Counsel had advised him that the point was bad, but he had still thought there was something in it. He was found guilty. He still endeavoured to raise an objection in arrest of judgment, but, after consulting Counsel, waived it. Kilmarnock and Balmerino were executed on 18th August, 1746. Cromarty was pardoned.

Lord Hardwicke also presided at the impeachment of Lord Lovat in 1747 for high treason. Lovat was the last of the old Scottish chiefs and had for fifty years led the life of an adventurer and conspirator. After a lurid career he was now, having passed the age of seventy years, at last brought to bay. He had by turns been Hanoverian and Jacobite, but the '45 found him for once on the wrong side. After Culloden he was followed, but might have escaped had he not been ill. Even then a younger man might have eluded the pursuers, but age and corpulence rendered him slow, and he was seized. His trial was only remarkable for the series of objections which he took to the admissibility of the witnesses. Most were futile. Some were disproved. All were overruled and he was convicted and executed. With this trial Lord Hardwicke's connection with the Young Pretender's bid for a throne came to an end.

Lord Hardwicke's career did not permit him to be a writer of distinction. There is an old jest that Baron Parke, when asked why he had not written a law book, so that

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posterity might have the advantage of his erudition, replied, "My works are to be found in the sixteen volumes of Meeson and Welsby," and met with the instant retort, "And if there had been a seventeenth, that would have been the end of the common law." The anecdote does give point to the fact that the contribution of a judge of first instance to the science of law is best judged by his decisions. He may have been able in earlier days to have written books on the law, but once he ascends the Bench his judicial duties tend to absorb all his matured faculties. Hardwicke throughout his judicial career had important administrative duties, and the wonder is that he was able to devote so much of his genius to the advancement of legal science by his judgments. He did write one work—on *The Judicial Authority belonging to the Master of the Rolls*, 1727. Some of his political speeches were published as pamphlets, and he left a vast mass of correspondence and documents which still remain extant, for the enlightenment of students of his period. But by these papers his legal position as a lawyer is little affected. It is as a judge that he attained his pre-eminence and gained a reputation which will never be forgotten so long as the principles of English justice are followed.

I put him in the very first rank of British Judges.

## THE EARL OF MANSFIELD

FEW men have enjoyed the *via laeta* which fate bestowed on Lord Mansfield. Throughout a long and busy life his career was almost monotonous in its continued success. He enjoyed an incredible variety of gifts. Of noble birth, handsome in face and figure, he was endowed with a robust constitution, a voice renowned for its silver music, a sparkling wit, a great intellect, an aptitude for severe study, a logical and persuasive mind ; and there was added the necessary spur in the form of scanty means, whereby he was compelled, being ambitious, to exert his utmost powers. Few have had his faculties and his opportunities ; fewer, possessing them, could have accomplished his work as statesman and lawyer. He did, indeed, suffer misfortune, writhe under calumny, and show (though very rarely) meanness of spirit ; yet these vicissitudes but served to exhibit in more vivid relief the fame of his achievements. By general admission, he earned the confidence and respect of his fellow-countrymen and has sustained his fame with unwaning lustre in later generations. His good fortune continued to the end. He was full of years when he retired ; but he was able to spend a few more in studious meditation, and died on the eve of a mighty conflict bringing in its train a period of anxiety, the full realization of which he just escaped.

William Murray, first Earl of Mansfield, was born at Scone Abbey on 2nd March, 1705. He was the fourth son of David, fifth Viscount Stormont, who, though the head of a branch of the great Murray family, was ill endowed with the world's plenishing. William was sent first to Perth Grammar School, but was soon transferred



THE RT HON WILLIAM, EARL OF MANSFIELD  
LORD CHIEF JUSTICE OF ENGLAND

From the picture by Sir Joshua Reynolds in the possession of Lord Mansfield



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to Westminster, where he became a King's Scholar in 1719, and made many friends. From Westminster he went to Christ Church, Oxford, where he matriculated on the 18th of June, 1723. It was the English education of Murray which made Doctor Johnson abate his dislike of Scots to the extent of conceding that much might be made of a Scotsman if you caught him young enough. It has often been said of English Universities at this period that education had declined to its lowest ebb. Gibbon poured contempt upon Oxford ; but then Gibbon hated everything from his regiment to the House of Commons. He even disliked his family. Murray can be cited with a host of other witnesses to prove that our Public Schools and Universities have always given to those who really desired and deserved it a sound tincture of letters. Murray never forgot his school or University : and his desire to be buried in Westminster Abbey was born, perhaps, among other motives of his longing to be laid near the scenes of his early years.

At Oxford he fell for the first time into competition with the elder Pitt, with whom he was to be in lifelong conflict, both as orator and as statesman. In 1727 Murray won the first round, gaining a medal offered by the University for a Latin poem on the death of George I. In the same year he graduated.

It was obvious that he must earn his living, and for a man of birth and small means the Church was, in an age already remote, a considerable temptation. Murray, who was, I think, a really religious man, was considering this easy way out, when one of his Westminster friends, Thomas, afterwards the second Lord Foley, came to the rescue and provided him with the means to go to the Bar. Nor did his leaning towards the Church prove in any way uncontrollable. He entered Lincoln's Inn, and was called in 1730, the year in which he proceeded to the degree of M.A., and was, thereafter, for a space employed in

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designing a course of legal study for the Duke of Portland's heir.

He did not by any means waste his time. He joined a debating society and frequented the company of literary men. Oratory he practised at his chambers in King's Bench Walk by the aid of a mirror and Alexander Pope. The result turned out better than might have been expected. A member of a Jacobite family, he began to associate with Bolingbroke and other high Tories. He was a pupil of Thomas Denison (who, in after years, was to be his senior puisne judge), and under him studied law with diligence and understanding. For a young man very much up to date and sophisticated, acquainted with the works of Locke and other philosophers, the rugged learning of Coke had little attraction. Biaction, who derived so much from writers upon Roman law, appealed to him with greater force, and for the Roman law itself he conceived a just admiration which is reflected in many of his arguments and judgments. He also studied the works of the great continental writers and the French *Code de Commerce*, at that time, in spite of its imperfections, the most advanced system of mercantile law in the world.

A man of Murray's gifts was unlikely to remain long in obscurity. Through his connexion he obtained briefs in Scottish appeals, and his first argument on such an appeal, on 12th March, 1733, ensured him a succession of these cases, so that he early obtained practical knowledge of a living and very learned system based upon the Roman law. In 1738 he was chosen to support at the Bar of the House of Commons the Merchants' Petition against Spanish aggressions. He was thus plainly and on his merits marked out for promotion. On the change of Government in 1742 he took silk and became Solicitor General. He entered Parliament as a Member for Boroughbridge, and represented that town until he was created a peer. In 1743 he continued in office under

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Pelham and became a Bencher of his Inn. In this year, too, he was given the freedom of Edinburgh, in recognition of his successful effort to prevent that city being disfranchised as part of its punishment for the Porteous Riots. Throughout his life he remained warmly attached to the land of his birth, and his predilection for Scotsmen attracted much comment, half humorous, half envious.

In Parliament he proved himself to be the ablest speaker on the Government side in an age when oratory (if you liked it ornate) was in its efflorescence. He was often opposed to Pitt, to whom he was inferior in vital force and invective, but whom he excelled in reason, logic, and elegance. It was on these three qualities that he mainly relied, though despising none of the arts of the orator, and making full use of a wonderful voice which earned him the name of "Silver-tongued Murray." Many of his speeches became famous : such as that which he made on 6th December, 1743, against disbanding the Hanoverian troops in the British service ; and another on the 28th February, 1744, supporting the suspension of the Habeas Corpus Act as a measure to combat the growing danger of a Jacobite rising. It was his paradoxical fortune that, by the support of such measures, he became insured against the temptation to revert to a family allegiance when the Young Pretender landed in 1745. He was destined, without inconsistency in his own career, to engage as prosecutor in the trials of the rebels in 1746 and 1747.

In the latter year he was one of the managers for the Commons on the impeachment of the aged conspirator Lord Lovat for high treason. His speech received warm eulogies from Lord Talbot, who had preceded Lord Hardwicke on the Woolsack, and also from the prisoner himself, who attributed a ruling of the Lords against him entirely to Murray's argument. He said : " I have since suffered by another Mr. Murray, who, I must say with



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pleasure, is an honour to his country ; and whose eloquence and learning is much beyond what is to be expressed by an ignorant man like me. I heard him with pleasure though it was against me. I have the honour to be his relation, though, perhaps, he neither knows it nor values it. I wish that his being born in the north may not hinder him from the preferment that his merit and learning deserve. Till that gentleman spoke your Lordships were inclined to grant my earnest request." This was a noble and generous, and I hope that it was to its hearer, a rather poignant tribute.

Murray was opposed to the mercantile theory of trade. He was a Free Trader before Adam Smith, as he showed by his speech in December, 1747, opposing Lord Hardwicke's Bill to prohibit insurance of French ships. He anticipated Bentham's opposition to the Usury Laws in his great argument before Lord Hardwicke in *Chesterfield v. Janssen*, but these advanced ideas did not stay his political advance. In 1748 he made a great defence of the Treaty of Aix-la-Chapelle, and in 1751 another on the Regency Bill. Curiously enough, about 1750 he was the subject of attacks on the ground that he was a convinced Jacobite. It was alleged persistently for some long time that he had toasted the Pretender at the house of a noted Jacobite tradesman of London. In the Commons his denial was unhesitatingly accepted, but in the Lords the Duke of Bedford persisted in moving for papers. Eventually, after a debate in which the matter was thoroughly exhausted, the motion was negatived without a division. There can be no question that the charge was baseless. Murray was one of the first of the Jacobite families to realize that adherence to that lost cause was a folly which could only perpetuate discord and weaken the nation. He was, as Macaulay says, "The father of modern Toryism." Nor did he lose by his acquired convictions.

In 1753 he was concerned in an opinion by the Law

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Officers on the effect of the outbreak of war upon Government loans. We were engaged in controversy with Frederick the Great on the Silesian loan, and the opinion given is one of the landmarks of international law. As a Law Officer in time of war, Murray had reason to make himself master of that branch of legal science. On 9th April, 1754, he became Attorney General ; but his tenure of office was destined soon to come to an end. In May, 1756, Ryder, the Lord Chief Justice of the Court of King's Bench, died, and Murray claimed the vacant place. His disappearance from the Commons was most unwelcome to the Cabinet and great efforts were made to induce him to remain. It is said that he was offered the Chancellorship of the Duchy of Lancaster for life and a pension of £5,000 a year. These offers, if made (which I doubt), did not influence him and, at last, on the 8th November, 1756, he took the degree of Serjeant at Law, and received the patent of Lord Chief Justice. He was sworn in before Lord Hardwicke at his house in Great Ormond Street in the presence of the judges and officials of his Court, and immediately afterwards the Great Seal was affixed to the patent creating him Baron Mansfield. He was fifty-one years of age when he commenced the judicial career which has for all time established his fame. That night he was the guest at a great farewell banquet at Lincoln's Inn, with which, as the rule then was, he severed his connexion on promotion to the Bench. On 11th November, 1756, he took his seat in Court.

He soon began to take an independent line. At that time, many applications fell to be made by motion and a practice had grown up to call on the members of the Bar to move in order of seniority. This convenient habit had produced an injustice, because it was rarely possible to dispose of all motions set down for the motion day, and, consequently, junior members sometimes waited weeks fruitlessly, so that their clients were driven to brief senior

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men. Mansfield altered the practice. He insisted on "going through" the Bar, and would not commence again at the senior until all had been disposed of in their order.

He did not by any means abandon politics. He was sworn of the Privy Council when the Duke of Devonshire's Administration was formed in 1756, but he refused the Great Seal. On 2nd December he made his first speech in the Lords against a Bill for releasing the members of the court martial on Byng from their obligation of secrecy. From April to June, 1757, he was in charge of the Exchequer, and on 30th June in that year he was admitted to the Cabinet, again declining the Great Seal. He was given (to a Scotsman how precious !) the Scottish Patronage. In May, 1758, he opposed a measure extending the Habeas Corpus Act to civil causes.

In this year he had before him two persons whose careers excited public interest. The behaviour of Earl Ferrers, especially towards his unfortunate Countess, had become a scandal. At last her relatives took proceedings for *habeas corpus*. The writ was disobeyed and a question was raised whether a peer of the realm could be attached for contempt during a session of Parliament. The matter was brought before the Lords on a petition. The debate was one-sided, as hardly a single peer cared to uphold Ferrers. Hardwicke and Mansfield both spoke against any privilege of peerage in such cases ; and so it was resolved. A writ of attachment was ordered to issue, and Ferrers came to Westminster Hall. He sent a message to Lord Mansfield, who replied that, as to matters pending in Court, he could only be spoken to in Court. Later, the Countess arrived and "swore the peace" against him. The Earl did not give security until 27th April, 1757. It was not long before he offended again, for in August, 1757, he drew a pistol at her, and was again bound over. At last a statute was passed separating the unhappy couple,

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and upon this being brought to his notice Lord Mansfield discharged the recognizances.

His connexion with Wilkes brought him into popular disfavour. He was bold enough to allow information against Wilkes for publishing No. 45 of *The North Briton* and directing the Essay on Women to be amended, during his absence abroad as the result of outlawry. Mansfield received many threatening letters but remained unperturbed. At last, Wilkes returned and moved to reverse the outlawry on a number of grounds. Mansfield took time to consider judgment but refused bail meantime. When, on 8th June, 1758, he did deliver judgment, he disallowed all the objections and then raised one of his own motion which he held to be fatal, and thereupon reversed the outlawry. Wilkes was then fined £1,000, committed to prison, and ordered to find sureties for his good behaviour. The Court omitted the usual penalty of the pillory, as it was certain that Wilkes would be made the hero of the occasion and serious rioting would break out. A writ of error was brought, but the House of Lords affirmed the Court of King's Bench.

Wilkes was the occasion for many decisions of the Courts upon Constitutional questions, and Mansfield was frequently called upon to decide them. In 1763 Chief Justice Pratt (Lord Camden) had decided in *Money v. Leach* that general warrants were illegal. This came up for review in 1765, when Mansfield upheld the decision. In 1768 he committed Bingley, the printer of Nos. 51 and 50 of *The North Briton*, to the Marshalsea. In May, 1770, however, he succeeded in persuading the Lords, contrary to Chatham's efforts, not to intervene in the struggle between Wilkes and the Commons arising upon his expulsion from the House. There can be no doubt that Wilkes and the constituency that elected him suffered injustice, but if the Lords had taken action it would, in all probability, have led to a Constitutional crisis of the

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first magnitude, without advancing the cause of the particular electorate. Mansfield steadfastly adhered to the doctrine held by Hardwicke and the great majority of lawyers : that the issue of libel or no libel was one for the Court and not the jury. He so directed the jury in three cases in 1770. In one they convicted, in another they acquitted, and in the third (*Rex v. Woodfall*), (the defendant being Wilkes' printer) they returned a special verdict : "Guilty of printing and publishing only." The word "only" prevented a conviction and the Court was forced to order a new trial. These three cases were based on the printing of the Junius Letters. In letter No. 41 Junius turned on Mansfield and accused him of subverting the Constitution by usurping the functions of the jury. In December, 1770, so great importance was attached to this point that the topic was debated in the Lords. Nevertheless, Mansfield adhered to his opinion and continued to give the same direction in later cases, notably *Horne Tooke*, (June, 1777), and *The King v. Shipley*, (1784).

In this case Wilkes again contested the issue. Lord Mansfield reviewed the authorities and cited the ballad :—

For Sir Philip\* well knows  
His innuendoes  
Will serve him no longer  
In verse or in prose,  
For twelve honest men have decided the cause,  
Who are judges of fact though not judges of laws.

In the volume of Erskine's speeches the last line is rendered : "Who are judges alike of the facts and the laws." Mansfield is more probably right, because no one doubted that the jury were judges of the question whether the innuendoes were right, and this enabled them in certain cases to circumvent the judge's power to rule whether the publication was a libel or not. In this case Mansfield

\* Sir Philip Yorke (Lord Hardwicke), then Attorney General.

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quoted with approval the maxim : " A popular judge is an odious and pernicious character." At last the controversy was laid to rest by Fox's Libel Act, 1792, which amended the law by declaring that the issue " libel or no libel " had always been a question for the jury.

I revert to Mansfield's career. When Bute was put into office the Chief Justice was included in his Cabinet, but the Prime Minister soon lost control, and Mansfield on a number of occasions voted against him. He retired in 1763 when the Grenville Administration was formed.

Mansfield supported Lord Rockingham's Administration of 1766, but opposed the repeal of the Stamp Act, taking the strict but stupid Constitutional line. In 1722 Lord Hardwicke, when a Law Officer, had advised that a Colony could only be taxed by Parliament or by its own representative Legislature, and in 1747 Mansfield had joined in a similar opinion. There can be no real doubt that Parliament had in law full power to tax the Colonies, and the financial situation caused by the Seven Years' War called for some contribution, for much of the expenditure had been on behalf of the American Colonies. It was not so much a question of strict law as of expediency and constitutional practice. Ministers had in their own history ample warning of the consequences of forcing taxation upon Englishmen who had no voice in the grant. Nevertheless, they had some excuse. There was then no federation of the Colonies : all were reluctant to contribute, and the task of inducing seventeen colonial legislatures to impose an even proportion was practically impossible of performance. The Government of this country adopted the worst method possible. The policy of imposing taxes was neither resolutely adopted nor definitely abandoned, and the consequence was the American Revolution. Mansfield, by tradition and temperament a supporter of the Prerogative, upheld the Crown through

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the conflict. He was right in law but profoundly wrong in policy.

After Rockingham came Grafton ; and Mansfield went into opposition. He attacked the Ministry for prohibiting the exportation of corn in the autumn of 1766. They had taken this step to mitigate a threatened scarcity, but Mansfield maintained that, in the absence of Parliamentary sanction, they had behaved with flagrant illegality.

We find him again at the Exchequer as a stop-gap from September to December, 1767.

At this period his decisions again attracted much attention and criticism. He had always been quite a religious man but without any trace of intolerance. It was abundantly clear, for example, that he was determined that no priest should be convicted before him of celebrating Mass, though the celebration had been made an offence by a Statute of William III. A rising anti-Catholic feeling caused this reasonable objection to legislation which had outlived its purpose to be denounced. His toleration was not confined to Roman Catholics. In *Rex v. Turkey Company*, in 1760, he had granted a mandamus to the Company to admit a Quaker who had made an affirmation instead of the prescribed oath. He pointed out that the Act 22 Geo. II, c. 46, which enabled Quakers to affirm, had only made three exceptions, and an oath to admit a man to the Company was not one of these. Yet, in *Rex v. Gardiner*, in 1761, he refused an affidavit on affirmation by a Quaker for the same reason, namely, that the Statute had prevented an affirmation being received on a criminal charge.

The whole subject was reviewed in *Atcheson v. Everett*, (1775, 1 Cowp. 383). There a Quaker was allowed to give evidence on affirmation in an action of debt founded on the Statute against bribery. Lord Mansfield declared that, on general principles, the affirmation of a Quaker ought to be admitted in all cases as well as the oath of a

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Jew or a Gentoo, or any other person who thinks himself really bound by the mode and form in which he attests ; thus bringing the principle into line with Lord Hardwicke's decision in *Omychund v. Barker*. He stated his principle of toleration in these words : " A scruple of conscience entitles a party to indulgence and protection so far as not to suffer for it, but it is of consequence that the subject should not suffer too."

In *Rex v. Wakefield*, in 1758, he had held that an order on Quakers to pay tithes was good. He pointed out that they could not buy land subject to tithe and escape payment merely because they conscientiously objected to tithes, and such an objection did not put the right to exact tithes in question. In *Rex v. Cox*, in 1759, he refused to interfere with a Justice of the Peace who declined to issue a summons against a baker for baking Sunday dinners. He expressed the view that the practice was likely to cause the Sabbath to be more generally observed ; the baker by staying at home enabled many who would have to remain away from church to attend. The actual decision was based on the fact that the Justice had not refused to entertain the application altogether, but had considered and rejected it.

In *Rex v. Wroughton*, in 1765, a rector failed in an information against a parishioner for obstructing divine service, because the reverend gentleman had been guilty of suppressing material facts. He had invited a Methodist to preach and this had caused the dispute. Mansfield was careful to prevent the decision being misunderstood. He said that Methodists had a right to the protection of the Courts in their decent and quiet devotions, and so had Dissenters if so disturbed.

He was capable of sympathy to persons who often fail to receive it. In *Rex v. Macdonald*, in 1765, an attempt was made to convict a man of converting his house into a lying-in hospital for single women. The indictment was quashed. Lord Mansfield said that the



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prosecutors had proceeded upon narrow, unpolitic principles, and inquired by what law it was criminal to deliver a woman when she was with child. The prosecution had been undertaken by the parish for fear the children born should be left chargeable to the rates.

In *Chamberlain v. Evans*, Mansfield put a stop to a practice which had been sanctioned by Holt. Under the Test Act all persons elected to municipal office had to conform. If a man so elected did not take up the office he was fined. The City had adopted the plan of raising money by electing wealthy Dissenters to various offices and then fining them for not acting. Holt's view had been that disqualification under the Test Act was no answer. It is said that the Mansion House was built out of moneys obtained in this way. Mansfield did not agree. The Toleration Act had established the right of Dissenters to worship in their own way, and their failure to assume office for which they were disqualified was, in his opinion, no ground to support a fine.

In 1771 he was called upon to review another decision of Holt's, who had decided that no claim to a slave in England could be maintained. In *Summersett's Case*, (Lofft 1), Mansfield listened to elaborate arguments, including a most learned one from Hargrave on the question of villeinage, and at the end decided that if a slave were brought to England he must be treated in all respects as a free man.

Soon afterwards he took part in the great *Douglas Case* and attracted to himself a number of attacks on the ground of his partiality for Scots.

In the Long Vacation of 1774 he paid a visit to Paris. Later in that year he delivered judgment in the celebrated case of *Campbell v. Hall*, (1 Cowp. 204), in which he upheld Holt's view that English settlers carried with them to their new homes their own laws and institutions. On 27th January, 1775, he delivered an equally noteworthy

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judgment in *Mostyn v. Fabrigas*, (1 Cowp. 161), in which he laid down the principle that a British subject who had been subjected to illegal treatment in a Colony could sue the Governor who had authorized it in an action in the English Courts. In this year was passed the Quebec Act, of which he was reputed to be the draftsman.

On 31st October, 1776, he was created Earl of Mansfield. He obtained permission to have a special remainder to his nephew, Viscount Stormont, having no children of his own. At this time, owing to a resolution of the House of Lords, it was believed that a peer of Scotland could only become a peer of Great Britain by descent, and for this reason the remainder was made out to an ancestor of the Viscount from whom he would claim by descent. Soon afterwards, however, the former resolution was reversed, and a new patent was issued giving a special remainder direct to Lord Stormont.

Mansfield was present at the memorable last appearance of Lord Chatham in the House of Lords, on April 7th, 1778, and almost alone of that assembly remained indifferent and unmoved. After the latter's death, during all the Parliamentary references to his lifelong opponent, Lord Mansfield maintained a studious and ostentatious air of indifference, a circumstance which proves how deep-seated was his dislike of his great contemporary and how even a great man may at times betray an ungenerous debasement of mind. He was himself nearing the end of his political career. The ill success of our arms was causing a political crisis, and he sought to avert it by a Coalition. His proposal received little support, and thereafter he took but little part in politics, though he acted as Speaker of the House of Lords from February to December, 1783. He made his last speech there on 23rd March, 1784.

Before then he had been an object of personal violence. His well-known tolerance and his support of the Roman Catholic Relief Act of 1778 had made him obnoxious to

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the opponents of that measure. In June, 1780, the mob, instigated by Lord George Gordon, began the celebrated riots known by his name. On 2nd June, 1780, he was surprised and hustled by a mob. He was only saved from serious injury by the courageous intervention of the Archbishop of York. As the riots grew to their height an attack was organized on his house in Bloomsbury Square. While the rioters attacked in front, he and Lady Mansfield just managed to escape by the rear. The house was looted and destroyed, and in the fire there perished his library, and those law books which he had annotated with anxious care throughout his career were all destroyed, and thereby much of his learning lost. His country house at Ken Wood, Hampstead, was also marked out for destruction, but the plan became known. The rioters were approaching the house when they were charged and dispersed by a troop of horse. In accordance with the simple ideas of treason then accepted, the people of Bloomsbury Square were gratified by the execution of some of the rioters in front of the ruins of Mansfield's house. In spite of all the violence and indignity thus visited upon him, such was his reputation for judicial impartiality that Lord George Gordon elected to be tried by him, and the aged Judge presided at the trial with his accustomed dignity and fairness.

For some years afterwards he continued to fulfil his judicial functions, and in 1782 he again became involved in controversy. Soon after the Act giving Ireland legislative independence was passed, he heard a case which had been brought in the King's Bench on appeal from Ireland. For centuries it had been settled that writs of error lay from the King's Bench in Ireland to the corresponding Court in England. But the Act abolished this practice. The case, however, had been brought into Mansfield's Court before the Act became law, and he merely tried a case which was in the list. Nevertheless, it was suggested

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that he was flouting the Statute. The charge was absurd.

At last, increasing age caused him to resign—a fact which gave Lord Eldon his first office as Solicitor General ; and on 4th June, 1788, after a judicial career of nearly thirty-two years, Mansfield retired to Ken Wood, where he spent the remaining years of his life in gardening, in re-reading the classics, and in religious meditation. He died on 20th March, 1793. Born in the year after Blenheim, he had lived to see the French Revolution. He was buried in North Cross, Westminster Abbey, by the side of his wife, Lady Elizabeth Finch, whom he had married on 20th September, 1738, and who had predeceased him. They had no children, and he was succeeded by Lord Stormont.

This is not the place to attempt to appraise his position as a statesman. He was guilty of grave errors and, like Hardwicke, cannot escape censure for the wholesale bribery carried on by the Ministries to which he belonged. But he had the merit (I suppose we must admit it) of following Bolingbroke in adhering to the House of Hanover and of carrying on the Tory tradition under a dynasty which in his days became “proud of the name of Briton.”

He was a handsome man, given to society ; both literary men and the other sex delighted in his undoubted wit. He is said to be the author of the maxim : “No case, abuse the other side’s attorney,” and to have given to a new Colonial judge who was totally ignorant of law the famous advice : “Never give any reasons.” It is related that the judge while he followed this advice was never reversed, but that, at last, encouraged by repeated decisions upholding his judgments, he was betrayed into the belief that he understood the law, and so delivered a judgment setting out his reasons, with the result that he was immediately dismissed for ignorance and incompetence.

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As an orator, Mansfield was very great. His voice earned him the title of "silver-tongued." To rhetoric he added knowledge, industry, and a power of logical suasion which combined made him a famous advocate. It was thought that to get Murray to state the facts for a party was worth as much as a full argument from anyone else, so inevitably did his presentation of the facts lead to a conclusion that his client was right. But he did not neglect the law. He laboured until he attained a mastery of principle and of practice, so that as a lawyer and as an advocate he stood supreme at the Bar.

But his great work as a lawyer was on the Bench. Hardwicke had been Chief Justice, but at the earliest opportunity had deserted the King's Bench for Chancery, where he earned an undying reputation. Mansfield, too, could have followed Hardwicke's example, but always declined. One may, perhaps, conclude that the obvious uncertainty of tenure ; the little that Hardwicke had left for his immediate successors ; and the knowledge that of all men he could, in the field of commercial law, discharge the task which Hardwicke had accomplished in equity, combined to form his decision.

His ingenuity led him to ignore obsolete forms. One example is his summary evasion of the requirement of an indenture. In olden times an indenture was written in duplicate on the same piece of parchment and then divided by an irregular cut, whereby the two pieces could easily be authenticated by being fitted together. The reason had gone, but, nevertheless, a document could not be an indenture unless one edge was ragged. An objection was made to Mansfield that a document was not an indenture because its edges were all straight and none was indented. He inspected the document, and held that it was an indenture because the edge was not mathematically straight. The rule was followed in form but destroyed in practice, and common sense prevailed.

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He was interested in the rules of evidence, which had been generally built up out of practice and decisions. He did not reduce them to a system but he developed them, and the very original doctrine of *res gestæ* is almost entirely his work.

In the ordinary work of the King's Bench when the judges sat together he reigned supreme. His knowledge, suasion, and authority secured adherence from his puisne judges, most of whom were tried lawyers, and to one of whom he had gone as a pupil. He stated publicly that for thirteen years the decisions of the Court were unanimous, and this fact led to the erroneous notion that to differ from the Chief Justice was to reflect upon him. None of the other judges would have hesitated to dissent had their opinion differed from his. It is also stated that no Bill of Exceptions was ever tendered to him. This was a method of appeal. It is also believed that only two of his decisions were ever reversed. He has not, however, entirely escaped criticism. During his lifetime he was often accused of being too ingenious in using alien systems to corrupt the common law, and he certainly was not prone to worship rules which had lost the reason for their existence. In the law of land he delivered many remarkable judgments, but I will only mention two. *Edmonstone v. Edmonstone*, (2 Paton, Sc. Ap. 255), was a Scottish appeal, and his judgment is said to have struck the fetters off half the entailed estates of Scotland. *Perrin v. Blake*, (1 W. Bl. 672), turned on a point about contingent remainders. Mansfield's judgment was reversed in the Exchequer Chamber and earned for him one of the worst misfortunes that can befall a lawyer. It was adversely criticized in Fearn's *Contingent Remainders*, a work of the highest authority though never of general circulation.

It is not necessary to deal at length with his career as a judge in criminal matters. He earned there, as elsewhere, a reputation for fairness and impartiality such

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as few judges have enjoyed ; but it was first and foremost his work in developing and explaining the commercial law that has ensured him a foremost place among English judges. His practice was to try such cases at the Guildhall with a jury. The panel was chosen with great care from among the merchants of the City, to whom there was no greater source of pride than to become "Lord Mansfield's jurymen." He invited them to dine with him frequently, and inquired minutely into the practice of reputable merchants, in return explaining to them with the greatest care the principles of law. When a case arose which involved a point of principle or some novel practice, he was accustomed to take their verdict subject to a case for the opinion of the full Court. He was aware that such a practice might cause undue delays, and was, therefore, careful to draw the case himself at once, and see that it was signed by counsel, before calling on another case. He made it an invariable condition that the case was set down for argument in the first four days of the next law term. In this way he examined, restated, or created the whole of the law of merchants. His long career and his deserved reputation have somewhat obscured the work of his predecessors, especially Holt, who, in many instances, will be found to have decided the same point in the same way. No judge can be a complete innovator. He is one of a long procession of fellow-workers, and undue prominence given to one may obscure the merits of another. Nevertheless, Holt could not have done Mansfield's work. He lived too soon, but he did noble work on the foundations of which Mansfield built the commanding fabric of our commercial law. The law relating to shipping, commercial transactions, and insurance was practically remade by Mansfield, who never lost sight of the fact that international commerce requires the law of each country to be based on the same principles ; the practice of honesty and fair dealing among prudent and honourable merchants.

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Coke captured the law merchant for the common law ; Holt retained it ; Mansfield formally incorporated it into our system.

In *Lickbarrow v. Mason*, (2 T.R. at p. 73), Mr. Justice Buller summed up Mansfield in words that have often been quoted. He said : " We find that in *Snee v. Prescott* Lord Hardwicke was proceeding with great caution, not establishing any general principle but decreeing on all the circumstances of the case put together. Before that period we find that in Courts of Law all the evidence in mercantile cases was thrown together ; the issues were generally left to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain principles which shall be known to all mankind, not only to rule this particular case then under consideration, but to serve as a guide to the future. Most of us have heard these principles stated, reasoned on, enlarged, and explained, till we have been lost in admiration at the strength and stretch of human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been determined by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country." Buller's words darken the previous ages for artistic effect. No one who reads them could imagine from their terms that cases on commercial matters were treated in the same way as other cases, and that way the one which produced the common law of England. Even before Mansfield's time judges could realize that the law was based on principle and knew how to apply the relevant principles to the particular facts of any given case. Mansfield inherited and improved the methods adopted by Holt, and there is no need to depreciate earlier judges in order to add to a fame which is securely established on its own merits. Holt tended the growing plant. Mansfield cared for it in its early maturity. We have entered upon



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the fruits of both their labours, and we should indeed be churlish if we had not gratitude enough for both and for their forgotten colleagues. In two respects Mansfield differed from Holt. He respected, not merely tolerated, the religious opinion of all. He realized, too, that Holt had made a mistake in curbing the growth of the action of *assumpsit*. By Mansfield's time it was realized that this form of action was the best way of bringing an action on a contract, and it was gradually developed until all forms of contractual actions have been absorbed. For merchants an easy non-technical form of legal procedure has the greatest merit, and those who are not merchants appreciate a means to litigate the point of substance. In his first reported decision, (*Baynard v. Chase*, 12th Nov., 1756, 1 Burr. 2), he struck the keynote of his judicial work. He said: "The general usage and practice of mankind ought to have weight in determinations of this sort affecting trade and commerce and the manner of carrying them on." To this principle he remained constant. Over and over again he inquires into the existing practice in all matters, not commercial cases only. By 1765 he had progressed so far as to declare that the law of merchants was part of the common law, (*Pillans v. van Mierop*, 3 Burr. 1663). Many of his cases are still leading authorities. I have already referred to some and will now give others which illustrate rather the varied activities of a Common Law Judge. In *Miller v. Race*, (1758, 1 Burr. 452), the question arose who was the owner of a banknote which had been sent by mail coach, stolen by a footpad, and came into the hands of a tradesman in the ordinary course of business. Holt had decided in former cases that the innocent holder had acquired a good title. Mansfield reviewed the cases and upheld Holt's view. In the course of his judgment he said: "It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the Bar or Bench and mistake their

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meaning. It has been quaintly said that 'the reason why money cannot be followed is because it has no earmark,' but this is not true. The true reason is on account of the currency of it ; it cannot be recovered after it has passed into currency." The heresy thus condemned will be heard to this day, but the course of decisions shows that Mansfield had seized on the truth of the matter.

*Rex v. Elizabeth Sarmon*, (1758, 1 Burr. 516), decides that it is not an indictable offence to stand on Ludgate Hill and distribute printed handbills. *Rex v. Wright*, (1758, 1 Burr. 543), affirms the principle that, if a Statute prescribes a particular procedure for an offence which it creates, no indictment will lie. *Rex v. Peters*, (1758, 1 Burr. 568), is noteworthy only in that Lord Mansfield desired one of the counsel to state the case for the benefit of the students before the Court delivered a reserved judgment. At that date there was a special box reserved for students, and it is a practice that might well be revived. *Baldwin v. Blackmore*, (1758, 1 Burr. 595), concerned a wife who had returned with her pauper husband to a place whence they had been removed by order of Justices. Mansfield inquired into the practice and found that not only wives, but sometimes also children, were committed for this offence. Mansfield's opinion was shown by his upholding a verdict for damages against the Justice who committed the woman. *Rex v. Clarke*, (1758, 1 Burr. 606), was habeas corpus obtained against a man of means living in Great Ormond Street. His daughter had, by the aid of one James Mervin, eloped to Broadstairs with James Isgrave who had been her father's houseboy. They were pursued, and the girl brought home cured of her infatuation. Mervin had the impudence to apply for a habeas corpus. In *Rex v. Davis*, (1758, 1 Burr. 638) Mansfield declared that every prison in the realm is the prison of the King's Bench. *Rex v. Schiever*, (1759, 2 Burr. 765), was a hard case. Schiever was a Swede,

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one of the crew of a vessel which was retaken from the French. He was taken to Liverpool and detained as a prisoner of war. His story was that his ship was taken by the French and he was forced to serve them, and at last got leave to go on the prize which was sent to Norway, where he would have gained his liberty. The Court held that his own story showed that he was a prisoner of war.

*Astley v. Younge*, (1759, 2 Burr. 807), decided that no action for libel lies in respect of an affidavit used in Court. Lord Mansfield pointed out that where the allegation is material there can be no scandal, and, if not, the Court itself can deal with the matter. *Rex v. Cowle*, (1759, 2 Burr. 834), decides that Berwick is in England. Lord Mansfield reviewed the history and authorities relating to the town, but confessed that he had been unable to discover why it was in the diocese of Durham. *Case of the Poor Prisoners*, (1759, 2 Burr. 867), was a claim to the poor-box of the Court. The prisoners on the common side of the Marshalsea claimed the benefit of certain fees levied on applications in the Court of King's Bench. The practice was, at the end of each term, for the money to be handed to the clerk of the junior judge to be spent charitably as the judge directed. A similar petition had been made forty-eight years before. Unfortunately, Mr. Justice Foster was present on both occasions and had taken a note of the former decision. An inquiry had been held and the claim proved to be baseless. In *Moses v. Macferlan*, (1706, 2 Burr. 1,005), Mansfield held that money obtained by an action by means of fraud could be recovered by *indebitatus assumpsit*. *Robinson v. Bland*, (1760, 2 Burr. 1,077), is one of the cases that Blackstone argued. It was held that a gaming debt incurred in France could not be recovered here. *Sulston v. Norman*, (1761, 3 Burr. 1,235), decides that an action lies for bribery though the person bribed voted for the other party. *Brown v. Chap-*

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*man*, (1763, 3 Burr. 1,418), decides that an action for damages will lie for maliciously making a man a bankrupt. *Rex v. Delavel*, (1763, 3 Burr. 1,434), was a disgraceful case where a female apprentice had been sold to a baronet. Mansfield insisted upon sifting the cause thoroughly. *Triquet v. Bath*, (1764, 3 Burr. 1,478), was one of several cases where Baron Haslang, the Bavarian Minister, lent his aid to debtors who sought to evade their debts. In this case the man succeeded. Lord Mansfield explained that the Act 7 Anne, c. 12, only added a penalty to the existing law. When the Tsar's Ambassador was arrested, he would only have been more incensed if the offenders had been punished ; nothing but death was appropriate. The Act was, therefore, passed as a national apology and a copy sent on an illuminated manuscript to the Tsar by an Ambassador Extraordinary who made excuses in a solemn oration. *Lockwood v. Coysgarne*, (1765, 3 Burr. 1,676), was the second case, but there the man posed as a physician but could not show that he had ever practised before. The Court examined into the circumstances and pronounced the employment to be merely colourable. The device also failed in the third case, *Fontanier v. Heyl*, (1765, 3 Burr. 1,731), where the Court laid down the rule that privilege would not be allowed unless the defendant swore to the nature of his employment and that he was actually engaged in it. *Ricord v. Betenham*, (1765, 3 Burr. 1,734), was an action on a Ransom Bill, which Blackstone argued. The action succeeded, but the practice was forbidden by Statute in 1785. *Lavie v. Phillips*, (1765, 3 Burr. 1,776), decided that if a married woman traded in the City she could be made bankrupt. *Hernaman v. Bawden*, (1766, 3 Burr. 1,844), was on the point usually supported by citing *Cutter v. Powell*. Mansfield held that a seaman was only entitled to wages if the voyage was completed. The practice is now quite different. *Postlethwait v. Parkes*, (1766, 3 Burr. 1,787), was an action

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for seduction. The discussion showed that the action does not lie if the girl were seduced while in another's household and delivered while at home. It was there pointed out that there were two forms of action : *Trespass* for entering the house and debauching the girl there, and *Trespass on the Case* in all other cases. Mansfield forced a compromise in order to avoid deciding in favour of the seducer. *Barries v. Foley*, (1767, 4 Burr. 2,149), was one of a large number of cases where postmasters were held not to be entitled to charge for delivering letters.

*Lowe v. Peers*, (1768, 4 Burr. 2,225), is a case beloved of students. An infatuated man signed a document not to marry anyone but Miss Catherine Peers and to pay her £1,000 if he did. He proved faithless and she sued him. Lord Mansfield reviews the whole law on contracts in restraint of marriage.

*Muller v. Taylor*, (1769, 4 Burr. 2,303), is noteworthy as the first case in which the judges differed since Mansfield's appointment in 1756.

*Parker v. Clive*, (1769, 4 Burr. 2,419), was an echo of Lord Clive's reforms in India. He had stopped certain perquisites and 175 officers threw up their commissions and were court-martialled. It was held they had no redress. They could not resign without permission and, therefore, were amenable to military law.

*Hargrave v. Le Breton*, (1769, 4 Burr. 2,422), was a case where the defendant had spoiled an action by saying that a mortgagor was bankrupt. It was held that malice was essential to "slander of title," and so the defendant got the decision.

In *Rex v. Faughan*, (1769, 4 Burr. 2,494), it was held an offence to attempt to bribe a Privy Councillor to procure an office.

*Bigby v. Kennedy*, (1770, 5 Burr. 2,643), and another case in the same reports (at page 2,793), contain descrip-

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tions of the proceedings on an appeal of murder. This proceeding is now repealed, the only law reform which Lord Eldon is known to have supported.

In *Lofft's Reports*, page 281, in 1773, an unnamed man was objected to as bail because he was described as a gentleman, whereas he travelled on commission "in the Birmingham way." Lord Mansfield would not listen to the objection. "Is no man," he asked, "to say he is a gentleman who deals by commission?"

Woodfall was again in trouble in 1774, being convicted of a seditious libel relating to the Revolution of 1688 and King William and Queen Mary (*Lofft* 776).

In *Rex v. Tubbs*, (1776, 2 Cowp. 512), he held that the right to impress seafaring men was founded on immemorial usage. In the same year he made the celebrated pronouncement: "The law of England is clear that declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." It was not a new invention of his, but was supported by authority, and has been recently applied in the *Russell Case*, (1924, A.C. 687).

*Back v. Longman*, (1777), decides that a musical composition is the subject of copyright under the first Copyright Act.

*Crepps v. Durden*, (1777, 2 Cowp. 640), largely nullified the Lord's Day Acts by laying down the rule that a man could only commit one offence of exercising his trade on each Sunday, not every time he sold anything.

*Da Costa v. Jones*, (1778, 2 Cowp. 729), was one of several cases on wagers as to the sex of the Chevalier D'Eon. Actions on wagers were then allowed, but in this case the Court dismissed the case on the ground that the wager was indecent.

*Walker v. Wilter*, (1778, 1 Doug. 1), decided that an action can be brought on a foreign judgment without proving the case made out to the foreign Court.

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*Planche v. Fletcher*, (1779, 1 Doug. 251), is noteworthy for Mansfield's dictum: "One nation does not take notice of the revenue laws of another."

*Robert v. Hartley*, (1780, 1 Doug. 311), in which it was held that privateers capturing a prize in company share in proportion to the numbers of their crews, contains his remark: "I was of opinion it would be improper to have a verdict for what is called a Norfolk groat"—which he explained as being an issue which neither party had come to try.

In *Rex v. Benchers of Gray's Inn*, (1780, 1 Doug. 353), a former bankrupt unsuccessfully applied for a mandamus to compel the Benchers to call him to the Bar. It was held that his remedy was an appeal to the judges.

*Furly v. Newnham*, (1780, 2 Doug. 419), decided that the proper method to get a prisoner of war to attend as a witness is to apply to the Secretary of State.

*Le Caw v. Eden*, (1781, 2 Doug. 594), was an action for false imprisonment by a mariner who was taken on a prize. The ship had been released by the Prize Court, but, nevertheless, the plaintiff was held to have no remedy.

*Whitcomb v. Whiting*, (1781, 2 Doug. 652), held that if one of several drawers of a joint and several promissory note gives an acknowledgment, none of the others can plead the Statute of Limitations.

*Le Gras v. Hughes*, (1782, 3 Doug. 81), decides that between capture and condemnation of a prize the captors have an insurable interest.

*Gregson v. Gilbert*, (1783, 3 Doug. 232), was an action on an insurance policy on slaves. The master mistook Hispaniola for Jamaica and so ran short of water. Sixty slaves died of thirst, forty threw themselves overboard, and 150 more were thrown overboard. The Court seized on the fact that the evidence differed from the pleading

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to defeat the plaintiff. Legislation was afterwards passed to prevent such insurances in future.

*Weatherstone v. Hawkins*, (1786, 1 T.R. 110), decided that a servant cannot sue his former master for defamation in giving a character unless he proves malice.

*Macbeath v. Haldimand*, (1786, 1 T.R. 172), lays down the important principle that a public servant who makes a contract in his public capacity is not personally liable on the contract.

In *Gundry v. Feltham*, (1786, 1 T.R. 334), Lord Mansfield held that a man justifies a trespass in following a fox with hounds over another's lands, if he do no more than is necessary to kill the fox.

The last case of supreme importance with which Lord Mansfield was concerned was *Sutton v. Johnstone*, (1786, 1 T.R. 493), where the rights of a commanding officer over a subordinate officer in action were discussed and settled. The case was ultimately pronounced upon by the House of Lords.

Mansfield left no writing of any note. His *Outline of a Course of Legal Studies*, already mentioned, was published in 1791, and another work, *A Treatise upon the Study of the Law*, was also published in 1797. His interest in students was shown in other ways. One I have already mentioned. The other, by far the most important, was that he persuaded Blackstone to undertake that course of lectures at Oxford which resulted in the famous *Commentaries*. The author was a friend to whom he lent a helping hand, and it was by his influence that Blackstone attained a judge's robe. There is a collection of Mansfield's letters and memoranda in the British Museum, but the most important of his legal notes were destroyed in his house.

Throughout his long judicial career Mansfield upheld the traditions of his high office. Of him it is related



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that he made no favourites and evinced no dislike. All counsel were heard fully and patiently. All litigants who came before him expected with a confidence which was never betrayed that he would hear the case with the single intention of administering justice according to law.

No list of the six greatest judges whom the British Empire has produced could exclude the brilliant name of Mansfield.



SIR WILLIAM BLACKSTONE, Kt.  
JUDGE OF THE COURT OF COMMON PLEAS.

From the painting by Sir J Reynolds in the National Portrait Gallery



## SIR WILLIAM BLACKSTONE\*

SIR WILLIAM BLACKSTONE was born at a house in Cheapside, London, on the 10th July, 1723. He was the posthumous son of Charles Blackstone, a silkman and citizen of London. Both parents came of Wiltshire families. His mother died when he was twelve, and the care of him then devolved upon his mother's elder brother, a London surgeon.

He was educated at the Charterhouse, where he became head of the school, and in 1738 he proceeded to Pembroke College, Oxford. Both at school and college he won distinction in poetry. It is, however, doubtful whether the Muses lost much by his determination to follow the law, which he evidenced both by joining the Middle Temple as a student in 1741, and by composing "The Lawyer's Farewell to his Muse," a work which attracted so much attention as to have been reprinted on several occasions, but which was not, in fact, his last essay in poetry. His interest in literature continued all his life, and, besides the composing of poetry, he, as a result of long critical reading of Shakespeare's works, compiled notes which were used by Malone in preparing his edition of Shakespeare. Blackstone also throughout his life took great interest in architecture. These studies no doubt assisted him greatly in building up his reputation for clarity of expression, exactness of language, and logical order, which are only attained by severe self-schooling, and are essential to the modern writer of legal text-books if his reputation is to be more than ephemeral.

\* A statue to Sir William Blackstone was erected in the summer of 1924 in London by American jurists of note.

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Once he elected to pursue legal studies, his career followed the usual course of the successful law student. Elected Fellow of All Souls' in 1744, he became B.C.L. in 1745, and was called to the Bar in 1746. After call his career continued to follow what is, unfortunately, too often the course of a successful law student. He attended the Courts, took copious notes, and failed to build up a practice. It was said that this was due to his "not being happy in a graceful delivery or a flow of elocution," but later criticisms of him as a judge would lead one also to believe that his want of progress was due to what is a far more potent cause than want of eloquence, viz., that he was diffident and inclined to give way to more impetuous and forceful opinions. By 1750 he would appear to have practically retired. His notes contain no record of any case between 1750 and 1756. He had, it is true, succeeded an uncle as Recorder of Wallingford in 1749, but he was busily engaged in University life. He devoted himself to completing the Codrington Library and to his duties as bursar and steward of his College, taking upon himself in addition the onerous task of arranging the College title deeds and other archives.

In 1750 the claims of kinsmen of Archbishop Chichele to special privileges at his College turned his attention to the legal problems of kinship. He published his conclusions in a work entitled *Collateral Consanguinity*, adopting the limitations which had been established by the Civil Law. His reputation as a learned lawyer was advancing, and it is said that he was only passed over in 1752 for the Regius Professorship of Civil Law because his promise of political support to the then Prime Minister, the Duke of Newcastle, was too lukewarm. His friends advised him to lecture on English Law, a new departure at Oxford, and he followed this advice with the greatest success. His lectures were so well attended that, in 1754, he published a scheme of arrangement of English Law under the title

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of *An Analysis of the Law*, the main lines of which were adopted from Hale. In the same year he was counsel in the Oxford Election Petition, where the right of copyholders to vote for Members of Parliament was in question. His researches were published under the title of *Considerations on Copyhold*. His argument was that copyholders had no such right, and this opinion was upheld, but subsequently a statute was passed to confer the franchise upon them.

In 1756 he resumed his notes upon cases argued in Court, and in 1758 he was elected the first Vinerian Professor of English Law at Oxford, where he continued his lectures before large numbers of students. In 1763, Jeremy Bentham was among this number. Bentham did not like him, and complained that he was "a formal, precise and affected lecturer," "cold, reserved and wary, affecting a frigid pride." This reputation had great consequences in the history of English Law.

From 1760, Blackstone's reputation was established, and he began to appear in many cases calling for learned argument. In 1761, he entered Parliament as Member for the pocket borough of Hindon in Wiltshire, and became Principal of New Inn Hall, an Inn of Chancery now long since dissolved. In the same year he refused the Chief Justiceship of the Court of Common Pleas in Ireland. It was then the usual practice to appoint English barristers to judicial office in Ireland. In 1763 he became Queen's Attorney General, an office which became unnecessary on the accession of Queen Victoria to the throne, and has not since been revived.

The success of Blackstone's lectures had led to the circulation of unauthorized copies, and this led him to publish them himself. The first volume appeared in 1765, and the four volumes were completed by 1769. This work, *Commentaries on the Laws of England*, had a prodigious vogue, and it is said that he received over

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£14,000 from the sale. It has been published in various editions over and over again, and in the modern revised form known as *Stephen's Commentaries* is still a recognized text-book. The effect on Bentham was such that he was led to publish his first book on legal topics, called *Fragment on Government*, 1776, and the teachings of Blackstone, as Sir Henry Maine said, made Bentham and John Austin lawyers "by repulsion." In 1766, Blackstone resigned his Professorship and Principalship of New Inn, and in 1770 was appointed a judge of the Court of Common Pleas. At that date no one could be made a judge who was not a Serjeant at Law, though many deferred becoming Serjeants until actually appointed. Blackstone, not being a Serjeant, had to become one, and as part of the ceremony he had to present to the existing members rings with a motto on them. He chose *Secundis dubiisque rectus*. He did not take his seat in the Common Pleas, as he immediately exchanged with Mr. Justice Yates of the Court of King's Bench, but on Yates' death later in the year he succeeded him in the Common Pleas. At that time there were three Common Law Courts, King's Bench, with a Chief Justice, and three puisne judges; Common Pleas, also with a Chief Justice and three puisne judges; and Exchequer, with a Chief Baron and three puisne Barons. These three Courts have now been amalgamated into the King's Bench Division of the High Court of Justice. Blackstone remained a judge of the Common Pleas until his death on the 14th February, 1780. Apart from his purely judicial work he was successful in obtaining an increase of judicial salaries and an alteration of the law as to the imprisonment of criminals. After his death his notes, which appeared to have undergone some measure of selection and arrangement, were published as *Sir William Blackstone's Reports* in accordance with the directions of his will.

Blackstone was diligent, methodical and painstaking,

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but his mental activity was not combative nor accompanied by physical activity. His indolent habits of body, and, it is said, a fondness for drinking, caused him when approaching middle age to become extremely stout. His education was accomplished at a period when learning is admitted to have been at a low ebb, but Blackstone is one of the many instances which show that then, as at all times, it was possible for an intelligent youth who desired to learn to acquire a sound education. He was well grounded in the Classics as they were then studied, and his efforts as a poet and Shakespearian critic have already been mentioned. The consequence of these studies was the formation of a prose style which extorted admiration from his most noted detractor, Bentham, who wrote that Blackstone "first of all institutional writers has taught jurisprudence to speak the language of the scholar and gentleman." It is true that John Austin, Bentham's disciple, was contemptuous, denouncing Blackstone for having made a "slavish and blundering" copy of Hale's work in "a style which is fitted to tickle the ear, though it never or rarely satisfied a severe and masculine taste." Bentham, however, before he began to write in language chiefly composed of terms invented by himself, was a master of style, but no admirer would claim more than that Austin expressed himself clearly. He certainly is a "painful writer" in the modern sense of the adjective, and his criticism is modelled on that of the fox in the fable.

Blackstone's activities were exercised in so many distinct spheres that it is impossible to form a general estimate of his career without segregating them into several heads. He had a distinguished career at his University; he figured in Parliament; he attained at last a considerable position as an advocate, and he for ten years sat on the Bench. He prepared a well-known series of reports. His chief fame rests on his *Commentaries*.

At Oxford he was an admirable preceptor and an



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excellent man of business. The love of order shown in his writings also made him noted for his management of affairs. It is not often realized that the Fellow of a College who has charge of its finances administers a patrimony which calls for the exercise of high administrative powers. His success or failure may have a marked effect upon the College for long years after he has become a memory. Blackstone had no sooner been elected a Fellow of All Souls' than he devoted himself to the completion of the Library and the reduction of the College affairs to order and routine. His successors benefited by his labours, and also by his system. When elected as a delegate of the Clarendon Press he advocated changes of management which effected permanent reforms in its administration.

Blackstone was not a learned man in the sense that he had an extensive first-hand knowledge of the authorities on any subject to which he applied his mind. His aptitude was rather the reducing to order and clarity the works and investigations of his predecessors. His want of originality had been insisted upon over and over again, and it would indeed be useless to deny the underlying truth of the criticism. But this may be pressed too far. For many years before Blackstone and his predecessors originality in the treatment of English Law has been practically impossible. A writer on law who treats of a living system must examine that system as he finds it. Works of authority are abundant, and it is always possible by examining ancient precedents to show, for example, that here Coke had not known all the relevant authorities ; there, that he has misunderstood or misread the authority upon which he relies for his statement of the law. Such investigation is proper and necessary for a writer who sets out to discuss the history of the law, but a lecturer who is instructing in the principles of law men who will shortly be practising would be misleading them if he did not

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realize that writers such as Coke made law even more by their mistakes than by their accuracies.

An institutional writer and lecturer must base his work upon received authorities, reserving his researches for special monographs with a more limited appeal. This is what Blackstone did. It is true that he made a number of errors, but to appreciate his labours it is only necessary to compare his *Commentaries* with the books and materials which were at the students' disposal before they appeared. Even now, many a student is repelled by his first experiences of the study of law, which, rightly understood, is one of the most fascinating pursuits open to an inquiring mind. Before Blackstone, no one but a law student read law except for severely practical purposes. Blackstone's *Commentaries* found their way into the country gentleman's library to the great improvement of the local administration of justice. By the time they appeared the English language had finally overcome both Latin and Law French, and, though legal terms can hardly be said to be in current use, yet the practical acquaintance of English people with the administration of justice enabled them to understand an exposition of legal principle when placed before them in the clear language and orderly arrangement of the *Commentaries*. They have been superseded for current use, for the vast changes in the law and its administration since Blackstone's day have caused the work to be re-edited into a different treatise. Its modern representative has not, however, succeeded in penetrating to the layman's library as did the original.

Primarily, the *Commentaries* were an elementary textbook for students and must be judged as such. Looked at from this standpoint, Blackstone's work was a great and noteworthy advance. Its very success caused it to be cited as an authority. As such, the work has many defects, for it was intended to be an exposition of the principles of English Law and not as an exhaustive statement of the

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law upon each and every subject. Lord Redesdale, when Lord Chancellor of Ireland, deprecated its use. He said :—

I am always sorry to hear Mr. Justice Blackstone's *Commentaries* cited as an authority. He would have been sorry himself to hear the book so cited. He did not consider it such. (*Shannon v. Shannon*, (1804), 1 Sch. and L. at p. 327.)

On questions of principle, however, it has often been used. Thus in the *Queen v. Millis*, which was decided in 1844, several of the Lords cited the *Commentaries* as an authority for the requisites of a valid marriage. Lord Hardwicke's Marriage Act had been passed after Blackstone had lectured, but before his *Commentaries* were published, so that the essentials of a legal marriage must have been considered by him. Lord Campbell, after reviewing the earlier authorities, referred, (10 Cl. and F. at p. 767), to Blackstone in these words :—

I do not find the subject again discussed until the publication of Blackstone's *Commentaries* : where, if anywhere, we may look to find the principles of our jurisprudence. If he has fallen into some minute mistakes in matters of detail, I believe upon a great question like this, as to the constitution of marriage, there is no authority to be more relied upon.

Lord Denman, 8at p. 21, mentioned Blackstone as agreeing in opinion with ten others whom he named as persons with names of the very highest rank in reputation, and referred to his "inestimable *Commentaries*." The Lord Chancellor, at p. 839, cited the relevant passages of the *Commentaries* as authoritative, and so did Lord Cottenham at p. 875 and p. 897.

But, though incomparable as an exposition of the general principles of English Law, the book suffers from grave defects. Blackstone perceived that certain general principles of jurisprudence should be stated, but he had no mastery of the philosophy of law, and, indeed, it would have been remarkable if he had. His introductory matter

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was compounded from the writings of Puffendorf, Locke and Montesquieu, and he owed much to Burlamaqui. His treatment is superficial and not always consistent with itself. Moreover, he had no marked intellectual independence, and his tendency to bow to established authority led him into a too easy acceptance of ideas and principles which had become unnecessary or even harmful, so that he betrays a marked tendency to support abuses and anomalies which could be abandoned without harming his principles. This want of philosophical equipment and of sympathy to reform was seized upon by Bentham and his followers. Blackstone was to them an irritant which stimulated their study of the law. Indeed, to criticize him they were of necessity compelled to find some philosophic ground for their criticism, and, though unwittingly, Blackstone may also claim to be the founder of their school, and by his very defects to have furthered the science and reform of the law to an extent which might have been impossible if he had been a more competent exponent of such matters. One most obvious criticism is that based on his division of the law into Rights of Persons and Rights of Things. The division is a real one, universally accepted; only the nomenclature is wrong, though the misuse of terms is a potent cause of error, but he took his terms from Hale, who was, and is, an acknowledged authority on English Law. Austin, who returns to the attack on these terms over and over again, was not impeccable, for he followed Blackstone in the more serious mistake of treating public law as a part of the law of persons. Blackstone has been credited with the invention of the term "municipal law" to denote the law of a country as distinguished from international law, but he himself disproves the claim, for he says that he took it from accepted use.

Blackstone's treatment of the Toleration Act and the civil disabilities of Roman Catholics and Protestant Dissenters was not only imperfect, but aroused serious con-

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troversy from its illiberal spirit. He maintained his position in the controversy, but was so far convinced that his later editions were modified so as to remove the cause of offence.

Before the publication of the *Commentaries* was complete, Blackstone's active connection with the University ceased by his resignation of his Professorship in 1766. Two years later he was returned to Parliament for Westbury, and, in that capacity, took part in one of the Parliamentary struggles which raged round John Wilkes. The result did not increase his reputation, for, having spoken in favour of the view that Wilkes was disqualified from election to Parliament, the Opposition countered him by reading from the *Commentaries* the relevant passages on such disqualification, none of which could apply to Wilkes. He was expected to reply, but sat silent and discomfited. The incident gave rise to a war of pamphlets in which he took part, and, on a second edition of his work being called for, he was careful to alter the passages in question so as to disqualify Wilkes. For this reason it was for some time a favourite toast of the Opposition to propose "The First Edition of Dr. Blackstone's *Commentaries*." However, the unfortunate debate did not prevent his being offered the Solicitor Generalship, which he declined. His elevation to the Bench in 1770 ended a political career which was not so distinguished as to call for much comment.

Blackstone's fame as an author rests on his legal works, and chiefly on his *Commentaries*. The defects of that work already referred to must not be taken to mean that he was incapable of patient research. His first publication in 1759 was an edition of *Magna Charta*, which involved prolonged and painstaking collation of manuscripts and a knowledge of mediæval law. His chief works have already been mentioned. The interest aroused in him by the study of consanguinity continued, as is shown by the care with which he noted cases relating to the limitation

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of estates and succession whether testate or intestate. It was not always his practice to set out the facts and arguments, and his doing so in such cases proves that he regarded them as of great importance. His works on Copyhold Tenure when contrasted with his treatment of the same topic in his *Commentaries* not only illustrates his weakness in trusting too much to other publications when preparing his lectures, but also shows that, when completeness and accuracy in detail were prime objects, he was perfectly capable of making his own investigations, and, from them, forming and formulating correct opinions. His *Reports* show that land tenure was one of the great interests of his professional life.

As an advocate he does not appear to have been constant in his attendance at Court. The fact that he had made some attempt at selection prevents any precise deductions from his *Reports* as to his appearances. It is known that he was in cases which he does not report, and it certainly does not follow that because he makes no note that he was not in Court. The cases may not have appeared to him to be of sufficient interest or importance. As he says that in many instances he owes his information to colleagues it may be assumed that where he does not say so he was present in Court during the hearing of the cases he reports without any acknowledgment. He does not seem to have reported any case on Assizes of his own knowledge, but the appearance of an Assize case is a rarity. He probably would have disclaimed any intention of making a *Nisi Prius* report (that is, of a trial before a judge and jury), and consequently it would be unsafe to assume that he did not go circuit, but his Oxford work would have been a great hindrance for a number of years. In some respects, too, he appears to have intended his *Reports* to have been reports of cases in the King's Bench, for though he includes some cases from other Courts they are exceptional, and when, at the end of 1769, he attended the Court of Ex-

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chequer, he made a note of the fact, apparently to excuse the absence of any cases during the terms in question. The fact that his *Reports* are silent from Trinity 1750 to Michaelmas 1756 and then again from the last-mentioned term till Michaelmas 1757, does, however, strongly suggest that he was not habitually practising, though during that period he was in the Oxford Election Petition. His resumption of his case notes in 1757 and onward coincide, however, with his tenure of the Vinerian Professorship from 1758 to 1766.

His *Reports*, therefore, are not an infallible guide to his professional activities ; nor can it be inferred that he was not briefed in cases where he does not mention the fact, for he frequently omits the names of some or all the counsel engaged. It is said that his name only appears twice between 1746 and 1760. The writer has not found his name as counsel before 1760 and in that year three times, but on the first occasion—*Williams d. Johnson v. Keen*, (1 W.Bl. 197)—he expressly says that he and others seconded Nares at the latter's request, and so presumably without being briefed. In Trinity 1760 he argued—(*Robinson v. Bland*, 1 W.Bl. 234, 260)—a case in which his client was sued for a gaming debt contracted in France. His argument is neatly arranged under two main and a number of sub-heads with a wealth of citations. During his argument he had to deal with the contention that the payment of gaming debts was one of the *points d'honneur* of Frenchmen, and that the *points d'honneur* formed part of the law of France. He admitted that payment of such debts was one of the *points d'honneur*, and attributed that fact to the circumstance that the French " had it from their German ancestors," but argued convincingly that the *points d'honneur* did not form part of the law. The Court decided, as was often the case in those days, to hear further argument, but, from the suggestions thrown out, it would seem that the judges did not consider that the whole ground

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had been covered by counsel. The case is still an authority, (see *Moulis v. Owen*, (1907), 1 K.B. 746). In *Michaelmas Term 1760* he moved for a *habeas corpus* against a naval officer to release a "pressed" man on the ground that the latter was a landowner. The Court did not desire to decide the point, and forced him to rely on the man not being a "seafaring man." Afterwards, in another case the ground first set up was held not to give any exemption.

In *Michaelmas 1761* Blackstone was for the plaintiff in *Tonson v. Collins*, (1 W.Bl. 321), in which it was sought to establish that there was a common law copyright quite apart from that created by a Statute of Queen Anne. It was customary for different counsel to be retained for second arguments, and Blackstone replaced Wedderburn. His elaborate argument is full of quotations, but, unfortunately, he had only looked at one casually, and did not complete it, so that he says that Terence was accused of stealing his *Eunuchus* from Menander, though if he had looked carefully he would have seen that the accusation was one of stealing from Nævius and Plautus. It was Terence who mentioned Menander. Blackstone's editor gives the quotation from the *Prologus ad Eunuchum* in full. The point was not then decided, as the Court ordered an argument before all the judges of the three Courts, but, after an argument there, it came out that the action was collusive, and therefore the Court refused to proceed farther with the case.

In Easter 1762 Blackstone was one of the counsel for the plaintiff on a trial at bar (i.e., before all the judges) relating to the capacity of a testator to make a will, (*Lowe v. Jolliffe*, 1 W.Bl. 365). The only point of legal interest was that the Court held that an executor who took no beneficial interest was competent to give evidence. In those days many persons were not allowed to give evidence for various reasons, one being they were interested pecuniarily in the result. Blackstone's note is that of a partisan



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who wants to tell the whole story. He relates that it was a black conspiracy, and that the Court would have committed the witnesses against the testator's capacity for perjury, but the offenders had prudently withdrawn. The Court recommended a prosecution, and, later, Blackstone notes who was prosecuted and the details of the sentences and the ultimate fate of the prisoners.

In the following term, Blackstone was briefed to oppose in the Court of Chancery a motion for an injunction to prevent the publication of an unauthorized *Digest of the Statute Law*. Baskett, the plaintiff, was the King's printer, and his patent, which covered the printing of all statutes, had been upheld in a previous case. The point was whether the notes to the statutes made the work a new one, or whether they were merely colorable to cover a pirated edition of the statutes. The Lord Chancellor thought they were colorable only, but would only grant a limited injunction. Blackstone adds the comment that this was equivalent to a total prohibition as the existing law printers were in league with the plaintiff to elude their contract with the defendant. In the same term Blackstone was counsel for the plaintiff in the Court of Exchequer on a claim for tithes in kind. The defendants set up nine witnesses, all of whom were overruled. Blackstone sets them out *seriatim*, accompanying each one with a statement of the decision heralded by an "N.B.," and winds up triumphantly that the Court overruled them all without even directing an issue to try the existence of any one of them, (*Torriance v. Legge*, 1 W.Bl. 420). His third case that term was in the King's Bench (*Stephen v. Coster*, 1 W.Bl. 413), where he represented the defendant on the second argument as to the right of wharfingers in London to charge wharfage on goods unladen into barges from ships moored at their wharfs. He succeeded in non-suiting the plaintiff. In a fourth case he showed cause against a *mandamus* to the Commissary of Surrey,

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and was building up an argument to justify the ecclesiastical judge, when Lord Mansfield, the Chief Justice, "interrupted the argument with warmth, said that the defendant had nothing to do but obey the King's writ" and the argument closed abruptly. Blackstone was also in a settlement case, making a total of five reported that term. In the Michaelmas Term he was retained for the second argument of a case, but the Court were satisfied on the first.

In February, 1764, he appeared for Oxford University on a claim of exclusive jurisdiction over a case which had been brought in the King's Bench, (*Kendrick v. Kynaston*, 1 W.Bl. 453). In the Easter Term he was concerned as counsel in one of the numerous proceedings arising out of the "Wilkes and Liberty" controversies. His client had been prosecuted for perjury as a witness in the great case of *Wilkes v. Wood*. The defendant had had the prosecution removed into the King's Bench by *certiorari*. A second indictment for the same charge was afterwards preferred, and this was also removed. The motion was merely to quash the first indictment as the prosecution desired to proceed on the second. Blackstone's opposition was obviously set up for an ulterior purpose, for he contended that the prosecutor should be named, and that the defendant should be put in the same position with regard to the second indictment as on the first. The application was adjourned, and next day the Attorney General appeared to lead Blackstone. The demand for the prosecutor's name was repeated, and, when granting the adjournment, the Court directed that the name should be given. Then it came out that John Wilkes was the prosecutor. The Court was surprised, as Wilkes had absconded from justice at the dates when both indictments had been preferred, and asked counsel what was his authority for making the statement. He replied he spoke on the solicitor's instruction, and this

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apparently satisfied the Court. Shortly afterwards the defendant was tried and acquitted.

Blackstone had by this time attained such a position at the Bar that he is frequently mentioned. He was among other cases junior to the Attorney General on the trial of an information against the Chevalier d'Eon for libel on the French Ambassador. This trial took place on the 9th July, 1764. In 1765 he was briefed on behalf of Cambridge University on a dispute as to the election of High Steward. The second Earl of Hardwicke was held elected to succeed his father in that office. In this year he was retained to fight an action on a ransom bill, given to a French privateer by the master of the ship *Syren*, which had been captured during the war. He was to have appeared on the second argument, but during the first argument a discussion arose as to the practice abroad with regard to such bills, and the case was adjourned to enable Blackstone to consult foreign lawyers. In the next term he informed the Court that he had consulted M. Meerman, the Pensionary of Rotterdam, and M. de Beaumont, avocat du Parlement de Paris, and as they were both agreed that such a bill was valid, the plaintiff was allowed to go on with his action, without further argument, (*Ricord v. Betenham*, 1 W.Bl. 563). During the next war such bills were made illegal by the Act 22 Geo. III, c. 25.

During 1766 Blackstone was counsel for merchants of the City of London, who were trying to obtain increased wharfage, and he records that the Law Officers were so content with his argument that they did not argue the case. However, the opposition was successful. In another case he appeared for justices who had refused to register a tenement as a place of worship for Protestant Dissenters. His argument was ingenious, and included the point that Methodists were not Dissenters, and consequently did not enjoy the benefit of the Toleration Act. The Court cut

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short the argument by holding that the justices had merely a ministerial duty, and if the persons registering were not entitled to the benefit of the Toleration Act the registration would not protect them.

During Hilary Term 1767 Blackstone was prevented from attending Court through indisposition. As the term only lasted three weeks that might easily happen without the illness being very serious.

His last reported case as counsel was *Davenport v. Tyrrel*, (1 W.Bl. 675). The decision, which was in favour of his client, was that the possession of one heir in gavelkind is not the possession of the other when he has entered with an adverse intent to oust the other. During Michaelmas 1769 and Hilary 1770 Blackstone attended the Court of Exchequer, but reports none of the cases. Before the next term he had become a judge.

Blackstone was a judge for almost exactly ten years, but was absent during Hilary Term 1780, and died almost immediately afterwards, on 14th February, 1780. As a puisne judge he did not often preside in Court, and therefore very rarely delivered the leading judgment. As a trial judge he did not preside at any trial of great interest, but it is recorded that more of his judgments and directions were upset than those of any other judge. This was to some extent due to diffidence. It was then the custom for a motion for a new trial to be made before the full Court, of which the trial judge was a member. Naturally, his opinion had great weight, but Blackstone did not support his views with any vehemence or pertinacity, and no doubt did not carry the Court with him on many occasions when a more vigorous judge would have done. This diffidence greatly diminished the weight of his influence, both in his own Court and in the Court of Exchequer Chamber, and also, no doubt, in the discussions at Serjeant's Inn which have now developed into the Court of Criminal Appeal.

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The most noteworthy cases in which he took judicial part were :—

*Perrin v. Blake.* The question was whether a testator's son John took a life estate or an estate in tail. The matter came before the Court as an issue referred by the Privy Council in an appeal from Jamaica. The Court refused to try an issue so referred, and to avoid the difficulty a feigned action was brought. In his *Reports*, (1 W.Bl. 672), Blackstone says that the decision was given on a special verdict—that is, one where the jury find the facts and leave the Court to decide whether in law the facts are in favour of one side or the other. He was wrong, as the argument was on a demurrer ; that is, one side having pleaded certain facts, the other raises the question whether, even admitting those facts, the law would support the contention based on them. Demurrers are now abolished.

The facts were that the testator gave property to his son John for life, then to another person for life, and then to the heirs of the body of John. According to the celebrated rule in Shelley's case, this gave John an estate in tail, and by appropriate methods he could turn that into an estate in fee simple. The testator had, however, expressly stated that his object was to prevent any of his children disposing of his estates for longer than their own lives. The question, therefore, was whether the rule in Shelley's case applied or not. The Court of King's Bench decided in Michaelmas 1769 that John had merely a life estate. Blackstone, who was then at the Bar, says that he was not present when the judgment was delivered. In February, 1772, he was one of the judges sitting in Exchequer Chamber when the appeal came on before eight judges, and he was one of the six who agreed in reversing the judgment below. The matter was then taken to the House of Lords, and there compromised. Seven of the judges, including Blackstone, took one view, and five the other. Blackstone's elaborate judgment was considered to

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be the most valuable, and was generally accepted by the profession as a sound exposition of the law. It is printed in the first volume of Hargrave's *Law Tracts*, p. 490, and abstracted in the sixth volume of the 3rd edition of Cruise's *Digest*, p. 355, and is discussed with much learning by Fearne in his work on *Contingent Remainders*, at pp. 156 *seq.* Curiously enough, Blackstone did not include the case in his *Reports*, though he did report the decision in the Court of King's Bench.

In the following year, 1773, he was on the wrong side in the celebrated squib case, (*Scott v. Shepherd*, 2 W.Bl. 892). Shepherd was in the street on the evening of the fair day at Nulbourn Port on 28th October, 1770, and amused himself by throwing a lighted squib into the market-house, which at the time was crowded with people. The squib fell on the stall of a gingerbread seller named Yates, and one Willis, to save the wares and to protect himself, threw it away, and it landed on the opposite side of the market-house on the stall of another gingerbread seller named Ryall. He, in turn, threw it away, but, unfortunately, this time it hit Scott in the face just as it burst, and put out one of his eyes. Scott brought an action for trespass.

At that time forms of action had to be used, and a plaintiff who was entitled to damages might lose his case, not because he had no claim, but merely because his advisers had pleaded the wrong cause of action. Trespass was the form for direct injury. If the injury were not caused directly the remedy was to bring an action of trespass on the case. Both these forms of action would in present conditions be called negligence. If Shepherd's act could be held to have continued until the squib burst in Scott's face, then Scott had sued on the right cause of action. The majority of the Court held that it did so continue, and so Scott held his verdict. Blackstone dissented, holding that Shepherd had committed a trespass

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on Yates only, and that what Willis and Ryall did prevented the further flights of the squib from being Shepherd's act. The opinion which prevailed has ever since been acted upon as correct, and Blackstone is thought to have taken too narrow and technical a view. It is only fair to him to add that all the judges agreed as to the principles applicable : the difference lay in the application.

It has been recorded that Blackstone had taken part in the Wilkes and Liberty controversies, both as counsel and as an M.P. He was also called upon to act as a judge in one case. Wilkes had a great following in the City, and his supporters included Brass Crosby, Lord Mayor and M.P., and Alderman Oliver. The Speaker had sent messengers into the City, and these two had sat as justices on a complaint that the messengers were acting on illegal orders. The House of Commons voted this to be a breach of privilege, and committed Crosby and Oliver for contempt. They were confined in the Tower on Speaker's warrants, which stated the facts which constituted the contempt. They applied to the King's Bench for writs of *habeas corpus*, and were refused. Then Crosby applied in the Court of Common Pleas before Blackstone and his brethren. It was contended that, as the warrants in question set out the facts, the applicant was entitled to show that these did not constitute a breach of privilege, and consequently the warrant was bad. The Court declined to decide whether there had been a breach of privilege or not, holding that the Commons were the sole judges of contempts upon them. A few days afterwards an application in the Exchequer on Oliver's behalf also failed. It is a peculiarity of the writ of *habeas corpus* that an applicant who is refused can go from Court to Court, until he finds a judge, if there be one, who will grant his application.

Apart from these three cases, there is nothing in Blackstone's judicial career that calls for special mention.

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It was only after his death that Blackstone became known as a reporter. His notes were originally made for his own use, and consequently are not uniform in character. Some consist merely of a single sentence, giving the gist of the decision, and all the reports which are for severely practical purposes are short and concise, really only memoranda. Those which record his own arguments are usually detailed, revealing his pride in them, and his incidental comments prove that he was apt to be a thorough believer in his own side. Thus, in making a head note for a case upon the construction of words in a will where he was on the losing side, he says in effect that the case shows when words can be "twisted" into conferring a fee simple when on their plain meaning they only create a life estate. The reports contain many incidental inaccuracies, but they were not finally prepared for publication by him, and no editor, however competent, can use notes in the same way as the maker. Many of the reports are obviously printed just as Blackstone took them down, as the arguments proceeded or the judgments were being delivered. These inaccuracies have given rise to the notion that his reports are generally unreliable, but that is not a fair criticism. He was capable of saying that a point arose in a particular way when in fact it arose in another, but not of misstating the point or the effect of the decision. After all, a reporter is not an author, and is not entitled to alter judgments or arguments or to be blamed if they are inaccurate statements of the law. The most severe criticism was in relation to a case which Lord Mansfield, the critic in question, did not thoroughly appreciate, and the adverse comment, if justified, was rather to be applied to the judgment than to the report containing it. The case in question was *Law v. Skinner*, (2 W.Bl. 996). In *Hassell v. Simpson*, (1 Doug. 91), which was decided shortly after Blackstone's death, Mr. Bower, during his argument, contended that *Law v. Skinner* was decided on a principle



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which was certainly not law, and used language indicating his opinion that the judgment was not correctly reported. Lord Mansfield agreed that the principle was not good law, and at the end of his judgment, (1 Doug. 93), he added :—

We must not always rely on the words of reports, though under great names. Mr. Justice Blackstone's *Reports* are not very accurate.

Nevertheless, the principle so impugned was afterwards acted upon, and the real ground of decision may easily be understood by perusing the judgments and authorities. Lord Mansfield forgot that shortly before, in *Ackworth v. Kemp*, (1 Doug. 43), he introduced his citation of a case by the words :—

I have a very correct report of it from Mr. Justice Blackstone's own note, which I will read.

A much truer appreciation is that of Lord Chief Justice Best in *Price v. Helyar*, (1828), 1 Moore and Payne, at p. 553 :—

It appears by the preface to the first volume of his *Reports* that the learned judge did not give his notes the last correction he had intended. Yet, we are well assured that there is nothing contained in any of the opinions of the judges or judgments of the Court that did not fall from the bench. He certainly took most accurate notes.

It is obvious that Blackstone's primary object was to preserve memoranda for his own use, but certain of the reports are too complete not to lead to the confident opinion that he intended publication. Had he carried out the project himself he would no doubt have eliminated many of the irrelevant details that complete the story without assisting to explain the point and the incidental comments and criticisms that occur, notably the adverse remarks about the Attorney General in Ratcliffe's case, (1 W.Bl. 8). Even then the *Reports* would have suffered, because they were not complete. He did not take notes of every case,

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and he never quite made up his mind whether the series was to be confined to cases in the Court of King's Bench. Sometimes he made inquiries to fill up gaps caused by his absence, but usually if he were not there no case is reported, and this constitutes a grave defect in the eyes of a practitioner who needs some assurance that if no case is reported it is because there was no case worth reporting. Many of his cases are worthy of being included in a book of reminiscences, but have no permanent legal value. Taking them as a whole, the *Reports* are fair and accurate statements of the decisions that are included, and, if that be borne in mind, they can be used with confidence.

In one case he records the subtlety of a barrister whose pleading on a simple issue had led to the pleadings being made up in a book of 2,000 sheets. The barrister had to justify in person as none of the Bar cared to appear, and it appears that he had in another action so improved his art that the pleadings ran to 3,000 sheets. The Court directed two other barristers to frame an issue, which they did on a quarter of a sheet. Robinson, the barrister, was the real plaintiff. He did not appear at the trial, and the reward of his ingenuity was that he had to pay the costs, "which amounted, it was said, to near £1,000." The case is interesting for legal reminiscence, but is hardly "reportable," (*Nates v. Carlisle*, 1 W.Bl. 270, 291).

Whitmore and Dawes were two students of Oxford who, on 14th October, 1748, spoke treasonable words, for which the Vice-Chancellor punished them academically. The Attorney General laid an information against them, and they were again punished, one part being "to go round immediately to all the Courts in Westminster Hall with a paper on their forehead denoting their crime." Which punishment, says Blackstone, was immediately put in execution.

Dr. Pumell, the Vice-Chancellor, was also before the Court over the matter. He was proceeded against for

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not taking the depositions of the informer in the last-mentioned case, and for neglect of his duty as Vice-Chancellor and as a justice for not punishing the two young men. It seems that the words were spoken in the streets. The point noted was then of some importance, viz., that the Court will not order the officers of a corporation to allow inspection of their books to furnish evidence for a prosecution. The object was to obtain the University Statute Book. Blackstone is frankly contemptuous. He comments that, as the book contained nothing that could affect the merits, or, even if it had, many printed copies were available, and the actual custodian could have been subpœnaed to produce the original, he formed the conclusion that the motion was only brought forward so that its failure could form the excuse for dropping the prosecution. It was, he adds, dropped after costing the defendant several hundred pounds.

In *The King v. Wigan*, (1 W.Bl. 47), the Court found nothing to blame in the inhabitants of that town who rose against an attempt to proclaim the Pretender and Prince Charles at a hunting meeting, and, as was alleged also, under cover of their loyalty rifled a house.

In *Wyndham v. Chetwynd*, (1 W.Bl. 95), Lord Mansfield is recorded to have doubted the generally received opinion that Lord Hale drafted the Statute of Frauds, as he died the year before it was passed. He made some further observations in the course of the arguments, for, after delivering the judgment of the Court, in which he reinforced his doubts about Lord Hale by more cogent arguments, he added :—

Whatever mistakes may have been committed in the course of this argument are imputable to myself alone.

*Basket's Case* concerned the right of the University of Cambridge to print statutes. The decision was communicated to Blackstone by Mr. Justice Foster in a letter

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dated 11th December, 1758. Oxford University was also interested. Foster states that certain words were "thrown in, by way of an intimation," to the University, "that we consider the powers given by the letters patent as a trust reposed in that learned body for public benefit, for the advancement of literature, and not to be transferred upon lucrative views to other hands. I hope both the Universities will always consider the Royal grants in that light." (1 W.Bl. 122.)

*Smith v. Stotesbury*, (1 W.Bl. 204), was an appeal from the Court of Stepney. A Sheriff's bailiff was promised a bribe, and, when it was not paid, sued in the Stepney Court (which had jurisdiction up to £5) and got judgment, but the Court of King's Bench "reversed the judgment with much indignation."

De Tessier was a young merchant of London who was convicted of contriving the escape of French prisoners of war. The Court was pressed to make him a public example, but, on his plea that corporal punishment or imprisonment might prejudice him "in his way of life," and expressing regret, the Court merely fined him £50, (1 W.Bl. 268).

Dr. Smollett is recorded by Blackstone as "a nominal physician in the bookseller's pay," when noting the punishment inflicted upon Smollett for libelling Admiral Knowles in the *Critical Review*, (1 W.Bl. 269).

*The King v. Kinnersley*, (1 W.Bl. 294), was a motion for an information against the printers of *Lloyd's Evening Post* for "a ludicrous paragraph giving an account of the Earl of Clanricarde's marriage to an actress at Dublin, and appearing with her in the boxes, with jewels, etc." The Court, in spite of argument and excuses, granted the motion "for it is high time to put a stop to this intermeddling in private families."

Mrs. Ward had harboured her niece, Elizabeth Vernon, who had left her father's house, and her aunt was suspected

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of furthering a design that Elizabeth should go to Scotland and marry an Irish officer. As she was under age, the Court granted *habeas corpus*, and also called upon Mrs. Ward to show cause why an information should not be filed against her. (1 W.Bl. 386.)

The next case concerns the woes of Mary Jerom, a Quakeress, who was admonished for frequenting balls and concerts, and then expelled "for not practising the duty of self-denial." She prosecuted the defendant for libel, but the Court not only held that the transaction was merely a matter of discipline, but went on to express their concurrence in what had been done. *Rex v. Hart*, (1 W.Bl. 386).

*The King v. Parsons*, (1 W.Bl. 392), reports a point of evidence arising in the trial for conspiracy connected with the Cock Lane ghost. The sentences are given at p. 401.

*The King v. Dalavel*, (1 W.Bl. 410, 439), gives an account of the career of Ann Catley, the daughter of a coachman who was apprenticed to a music master. She was seduced by the defendant, a baronet, who procured the transfer of her apprenticeship to himself, at a cost of £400. The Court was at first inclined to censure the parents, but they succeeded eventually in clearing themselves. The Court declared that the young woman was so thoroughly vicious that they had no hopes of reclaiming her. The attorney who acted in the transfer was censured, and he, with the baronet and the music master, had a rule for an information made against them, but with what result does not appear.

In 1763 the minister and churchwardens collected £14 for sufferers by a fire at Alborne in Wiltshire. They spent about £9 on tavern entertainments and returned that they had only collected £5 3s. 4½d. The Court thought the ordinary methods of prosecution sufficient to meet the case. (1 W.Bl. 443.)

*The King v. Farrel*, (1 W.Bl. 459), raised the question

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whether a man who struck a mortal blow on the high seas is triable in the country where his victim eventually died. The Court secured the attendance of the prisoner at the Assizes, but expressly declined to say whether there was jurisdiction to try him.

In *Sivan v. Broome*, (1 W.Bl. 497), the question arose whether a judicial act could be done on a Sunday. Lord Mansfield was strongly inclined to hold that it was, and mentioned that he had sat in Parliament on a Sunday. Blackstone adds a note that it was on the sudden death of George II, in pursuance of the Act of Queen Anne, but as the Lord Steward did not appear to administer the oath both Houses departed without proceeding to business. Afterwards, Blackstone convinced the Court that Sunday was a *dies non*, (1 W.Bl. 526), and the decision was upheld in the Lords, (6 Bro. P.C. 132). *The King v. Kearsley and others*, (1 W.Bl. 540), gives the punishment of the printers and publishers of the *North Briton*.

*Money v. Leach*, (1 W.Bl. 555), is the decision on appeal from the Common Pleas that general warrants are illegal and void. The point had been covered by *Entrick v. Carrington*.

In *The King v. Lord Baltimore*, bail was allowed in a rape case. The law was perfectly clear, and the only interest was in the circumstances, which clearly suggested that the prosecution was not justified. Indeed, Lord Baltimore was acquitted at the trial, (1 W.Bl. 648).

We recognize, in taking leave of him, a persuasive and successful advocate ; a graceful, though not profoundly learned, expositor of the Common Law ; and a judge, conscientious indeed, but not of great distinction.

## THE EARL OF ELDON

TO Eldon's Chancellorship is usually assigned the completion of equity. It had developed into a harmonious system of law. The Court of Chancery began by seeking to redress those cases where the rigorous application of the rules of common law had caused patent hardships. *Hic est*, it was said of Thomas à Becket, *qui leges regni cancellat iniquas et mandata pii principis aequa facit*. Each case at first was dealt with on its own facts. The Chancellor sought to do right by the petitioner without regard to what he might have done in similar cases in the past or might do in the future. But no Court can exist long without establishing a practice or habit for similar cases. Like issues tend to be decided in like manner. Precedent arises and so becomes a rule, and after a time a binding rule, fettering the discretion and limiting the jurisdiction of the Court.

In the Court of Chancery this process became for the first time very observable under the Earl of Nottingham. Soon after his day we find reports of equity cases. The development became more marked in the time of Hardwicke. It was inevitable that, sooner or later, some Chancellor would complete the work, and it so happened that Eldon was called upon to do it. Thenceforth equity was no longer the "roguish thing" about which no one could prophesy with authority, since equity varied, as Selden phrased it, "with the length of the Chancellor's foot." The litigant who approached the Lord Chancellor as a suppliant must not complain of the wrong done him by the law unless he can also show that that wrong was capable of remedy according to the settled and established



THE RT HON JOHN, EARL OF ELDON  
LORD HIGH CHANCELLOR

From an engraving by E. Scriven





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principles of equity. Thenceforward, the judiciary disavowed innovation ; 'abandoning that field to legislation. Hence it is that the nineteenth century marks the habitual interference of the Legislature with private right. Equity no longer sought to do justice without qualification. The Lord Chancellor, as well as the Lord Chief Justice, administered justice according to settled principles.

Eldon was, perhaps, more favoured by fortune than any other famous judge. Not only did he enjoy good health and long life, but he was blessed with an affectionate elder brother, on the whole more gifted than himself, who, by his brilliant gifts, carved himself a career, lending a helping hand to his brother on the way. These advantages were increased by an early, romantic, and successful marriage, whereby he won many years of domestic happiness and content. Wise friends aided him with counsel and influence. He chose a sphere wherein he had few rivals ; and, in days when influence and patronage were enjoying an Indian summer, he exhibited the canny power of gaining and keeping the confidence of the highest in the land. The man indeed possessed a great quality of patient suppleness. He attained office when the system of payment, which yielded such poor results as to tempt Bacon and Macclesfield to their fall, and to gain for Somers a reputation for greed, had, by changed circumstances, become so lucrative as to cause men to think that the rewards of office were excessive.

Lastly, it was his lot to hold office for long years of warfare during which the existence of the nation was always in peril ; and to continue to aid his country's counsels until it had emerged victoriously. But he failed to realize that the institutions which he had helped to preserve needed to be reconsidered and reconstituted ; and he drifted in the end into an almost comatose state of mind, in which, by absolute denial of change, he put in jeopardy those very things which he strove at all costs

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to preserve. But, though he saw his political rivals gain office, and the changes he abhorred brought into force without the evils that he feared, he was spared to see the dawn of that age of prosperity which men call the Victorian Era. When he died he had outlived enmity and was mourned, though without hysteria, by all. His career proves that pre-eminent and outstanding success in the law demands not only ability, but health, opportunity, and good fortune.

John Scott, first Earl of Eldon, was born at Newcastle-on-Tyne on 4th June, 1751. His father, William Scott, was a coal factor of means, owning, beside his business, a number of barges and a comfortable public house. He was himself the son of another William Scott, who, in his life, was a yeoman in Northumberland. Farther back, the family history is not known. It is probable enough that these Scotts belonged to the great race of that name, though when and how they separated from the parent stock they had not troubled to remember. Perhaps, as so many sturdy North-countrymen have done, they valued themselves for what they were, and not for what their forbears had been. It is by no means a bad start in life to be born the son of a prosperous freeman of Newcastle. William Scott had married twice. The second marriage was very remarkable in that two of the sons of that union attained great eminence as jurists. William, the elder, was the Judge of the Prize Court during the Napoleonic wars, and made his way to the House of Lords as Lord Stowell. He was very fond of his young brother John. There was another brother between them who does not come into the story. William had probably more influence upon John's life than a twin would have had. His very birth was fortunate for the younger son. Mrs. Scott was heavy with child, expecting her first-born, when the news of Prestonpans came to Newcastle; and she was hurriedly taken away lest an irruption of wild Scotsmen should

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endanger her and her unborn child. The panic is said to have been so great that her husband could not get the gates of the town opened to let her pass, and she had to be lowered over the walls in a basket into a waiting boat. Fortunately, no harm befell, and a fine boy, known to the world as William, Lord Stowell, duly appeared. But for the rising he would have been born in Newcastle, and this memoir might never have been written ; for, being born in the County of Durham, he was afterwards enabled to win a close scholarship to University College, Oxford. Otherwise it is probable that neither William nor John would have seen that University. John was educated at the local Grammar School, and retained so much regard for his classical master there that he made him his chaplain in after years. The boy was destined for business, but William, thinking it a pity that John should not go to Oxford like himself, persuaded his father to let his brother have a University career. So in 1766 the younger son mounted a coach on his way to his brother's college. The coach door had a motto *Sat cito si sat bene*, which, in later years, he often cited. It was indeed prophetic of the bitter complaints of delay that were hurled at him when he grew grey in office. In 1767 John, too, obtained a close scholarship, and on 20th February, 1770, he proceeded B.A. Thirty-one years later the University conferred honour upon him by electing him High Steward.

In 1771 he won the English prize essay, and, like many before him, was considering what to do for a career. Though not a specially religious man, the idea of Orders came to him, but Cupid perversely and incongruously intervened. He met and won Elizabeth Surtees, daughter of a Newcastle banker. Her father and mother frowned at a young man who was looking so high above him. They forbade him the house but could not safeguard the young lady. On the night of the 18th November, 1772,

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Elizabeth escaped from her home and joined young John Scott. Next day they were married, and informed the injured parents. Surtees was too fond a father to remain for ever estranged from his daughter. Soon he forgave her, and the young couple were taken into favour. Indeed, £3,000 was settled upon him ; but they had to be married again, and accordingly (in an old-fashioned phrase) they repeated their vows on 19th January, 1773. This marriage had vacated Scott's Fellowship, and the problem of an occupation became somewhat pressing. He decided on the Bar, and entered as a student at the Middle Temple on 28th January, 1773. To complete the story of his connexion with that Inn, he was called there on 9th February, 1776 ; elected a Bencher on 20th June, 1783 ; and attained the highest office there when elected Treasurer for 1797. But in 1773 a student, with a wife to support, he needed immediate employment. He was favoured by chance. The Vinerian Professor needed a deputy. The pay was only £60 a year, but it would suffice ; and the frugal ex-Fellow proceeded to Oxford to read lectures while eating dinners. He knew no law, but his duties were confined to reading the Professor's lectures ; so that his ignorance of the law furnished no real obstacle. It is said that his first lecture was a great success. On opening the manuscript he announced, to his own confusion, that the lecture was on the Statute of Philip and Mary passed to punish men who entice away heiresses and clandestinely marry them.

While delivering another man's lectures, he was acquiring knowledge for himself by assiduous study of the law. During his student period he withdrew from society, spending all his available time at his books. He removed to London in 1775 and became a pupil of Duane, a celebrated conveyancer. He did not confine himself to that branch of law, but studied the law as a whole. He is, however, almost the first of our celebrated lawyers who

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was not familiar with the Roman law. He gained nothing by this circumstance. This is not so much a criticism of Scott, though the lack of Roman learning was a blemish, as a tribute to the native excellence which our law had reached as a result of the judicial labours of Hardwicke and Mansfield, of the academic, if bland, exposition of Blackstone, and of the brilliant speculations of Bentham.

The fame of Mansfield attracted Scott as soon as he was called to the Court of King's Bench. But he migrated quite early to the other side of Westminster Hall, believing that Mansfield gave undue preference to Christ Church men. Probably the limpid, lucid mind of the great Chief Justice was somewhat impatient of the stilted clumsy speech of a man who, though he might justly lay claim to ability, had not learned to express himself with either clarity, grace or precision. As an equity lawyer, he soon made his mark, aided by the friendship of Lord Thurlow, the Lord Chancellor, and of Kenyon, who was then at the Bar but who was thereafter to earn some distinction as a judge.

Scott had taken the precaution of becoming a freeman of Newcastle by patrimony in October, 1774 ; his father-in-law soon procured for him a general retainer for that Corporation. His practice was fairly established when, in 1780, he had that chance of which every young lawyer dreams. He appeared in *Ackroyd v. Smithson*, in 1780. The story runs that the solicitor gave him a brief for the heir-at-law to consent to an order. When Scott read the statement of facts he slapped his thigh, and said, "I'm damned if I do," and when the case came on for hearing he demonstrated that the fund in dispute belonged to his client. The decision is now so absorbed into the very structure of the law that it is difficult for us nowadays to appreciate his feat. The argument seems so obvious, much as the feat of balancing an egg on its end was obvious,

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after Columbus showed how it was done. The case went to appeal, and his argument was upheld by the Lords. In a day John Scott had become famous, and briefs poured in. It is said that shortly afterwards he was retained to argue a case against the principle of *Ackroyd v. Smithson*, but when he began he was stopped by the judge, who said : " Mr. Scott, I have read your argument in *Ackroyd v. Smithson*, and I defy you or any other man to answer it. Sit down, I beg you."

The quality of his practice so gained is shown next year by his appearance on the Duke of Northumberland's claim to be Lord Great Chamberlain, and in the Clitheroe Election Petition. In 1782 he was counsel in the Newcastle Election Petition, and also attended at the Bar of the House of Commons on behalf of Peter Perring, a member of the Madras Council, on the Committee stage of a Bill for preventing Perring and others from leaving England. On 4th June, 1783, he took silk ; twelve days later he entered Parliament as Member for Weobley, in Herefordshire ; and yet four days later he became a Bencher of his Inn. His political career began as one of the " King's friends," and he supported the Monarchy throughout his life. His early appearances in the Commons were so unsuccessful as to render it doubtful if he would ever succeed. On the first reading of Fox's India Bill his maiden speech was merely ineffective, but he made a second attempt on the third reading. He had prepared a pretentious effort, but the turgid pomposity of his speech dismayed his friends and delighted his opponents, who exulted in the brilliant satire with which Sheridan overwhelmed one who seemed merely a lawyer. But after an interval of quiet he tried again. On 9th March, 1785, he denounced the scandals of the Westminster scrutiny in a speech which gained attention and respect. In February, 1787, his speeches were listened to ; and his defence of the Commercial Treaty with France marked him out for promotion.

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His first promotion was not political. In March, 1787, he was appointed Chancellor of the County Palatine of Durham, whereby he became the Equity Judge for a great area in the north-east of England. At that time the appointment was in the hands of the Bishop of Durham, who was Lord Thurlow's brother, so that probably that redoubtable Lord Chancellor had much influence in the Bishop's decision.

In February, 1788, John Scott was using all his endeavours to secure for Sir Elijah Impey a fair trial on charges levelled against him upon his conduct while Chief Justice in Calcutta. In March, 1788, we find him supporting a Bill to put on the shoulders of the East India Company the cost of transporting troops to the East. On 27th June, 1788, he became Solicitor General, as a result of the legal changes following the resignation of Lord Chief Justice Mansfield. He was knighted in accordance with the usual practice ; it is said (probably untruly) that, like many another Law Officer, he would have preferred to dispense with the accolade.

He was immediately plunged into the Constitutional disputes which arose as a consequence of the King's insanity. The natural course was to call upon the Prince of Wales, who would at once have displaced Pitt for Fox. George III was able to prorogue Parliament in September, 1788, but when both Houses reassembled in November he was clearly insane. There was no King's Speech, but, notwithstanding Constitutional usage, Parliament eventually decided to discuss the situation without a King's Speech. Much time was occupied in ascertaining the exact condition of the King. A motion was proposed to search for precedents, when Fox startled the political world by announcing that the Prince of Wales was entitled to exercise the rights of Sovereignty. Parliament, he contended, was entitled only to declare the date when that exercise was to begin. Pitt, on the other hand, main-



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tained that the sole right to deal with the situation was vested in Parliament. The dispute grew hot. Both parties perceived that their claims were stated too boldly. In the midst of the dispute the Speaker died. His successor was elected without attempting to obtain the King's sanction. The suggestion was that both Houses should authorize the Lord Chancellor to affix the Great Seal to commissions for opening Parliament and for assenting to the Regency Bill. The reason for a Bill was to prevent the Prince of Wales from impairing the King's authority if he should recover.

Parliament was eventually opened by means of this fiction. In the meantime the circuits became due, and the Great Seal was affixed to the Commissions of Assize without the King's sanction. While the Bill was being discussed the King was declared to be recovering, and by 27th February, 1789, further bulletins were discontinued by his own command. The fiction of assuming the Royal Assent by the use of the Great Seal was condemned then and since, but at that time a mysterious efficacy was believed to rest in that symbol of authority. It was for that reason that James II cast into the Thames the Great Seal which Jeffreys surrendered to him on the eve of their flight in 1688 ; and for the same reason its recovery was hailed with such delight by William's adherents. George III was so impressed with the crisis that, in a mood of gloomy presage, he urged his Ministers to make legislative provision to avoid such difficulties in future. Nothing, however, was done, and on three subsequent occasions the King's insanity brought about Constitutional troubles. In 1801 his mind again went when Pitt had tendered his resignation, and Addington was forming a Ministry. In 1804 a further attack caused anxiety. Then the Cabinet, which included Lord Eldon as Lord Chancellor, disregarded incapacity altogether, a fact which, in 1811, Lord Grey made the basis of a charge

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of treason. In 1810 George III succumbed to the last attack, which never released him until his death in 1820. The precedent of 1788 was followed, and the Prince Regent disappointed his friends by adhering as Regent to his father's Ministers.

Throughout the disputes of 1788 Sir John Scott supported the Government.

In 1790 a suspicion of corruption fell upon him. He had expressed the opinion that the impeachment of Warren Hastings had abated by reason of the dissolution of Parliament. He may have been wrong ; but there was certainly authority to support his view. Some of those who were attacking Hastings found it inconceivable that such a strange opinion could be honest, and leaped to the absurd conclusion that the Solicitor General had been bribed ; a baseless, even a ludicrous, charge.

In 1791 he was concerned in the debates on Fox's Libel Bill, to which he secured amendments. Like every other noted lawyer, he held the view that it was for the judge to decide the issue " Libel or no libel " ; but there can be no doubt now that, however well founded in law that view may have been, the controversy found a fortunate settlement in this Act.

On 15th June, 1792, the Prime Minister at last rebelled against Lord Thurlow's insubordination, and enforced his dismissal. Sir John Scott, as the Lord Chancellor's protégé, felt bound to tender his resignation, but at Thurlow's instance he withdrew it. On 13th February, 1793, amid the horrors of the French Revolution, Scott became Attorney General, and in that capacity was responsible for legislation and prosecutions which rendered him for some years the best hated man in England. In rapid succession there followed the Traitorous Correspondence Act, 1793, the Habeas Corpus Suspension Act, 1794, the Treasonable Practices Act, 1795, and the Seditious Meetings Act, 1795. In the course of enforcing these

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Acts, and in pressing on the *ex officio* informations for libel, he incurred venomous criticism from the Press, and retaliated with the Newspapers Proprietors Registration Act, 1798.

It is, perhaps, only a coincidence that the two famous Law Officers who made the greatest use of prosecutions for libel were the two who devoted their study almost exclusively to English law : Coke and John Scott. The latter, too, was active in treason prosecutions, and the strain he put upon the rules of constructive treason did not on the whole strengthen respect for law. Criticism unduly repressed became unduly vigorous and indiscriminate. The age was not squeamish ; and the crude beginnings of free discussion might shock even the most hardened of modern controversialists. But after six hectic years, in which juries had done so much to hamper his verdict-getting, he reached a comparative calm on the Judicial Bench in 1799. On 19th July of that year he was made Lord Chief Justice of the Court of Common Pleas, and raised to the Peerage as Baron Eldon, taking the name from an estate in Durham acquired by him in 1792. He did not deem himself excluded from politics thereby, and on 27th February, 1800, he made his maiden speech in the Lords in support of the continuance of the Habeas Corpus Suspension Act. In April he was again speaking in aid of Lord Auckland's Bill to prohibit the marriage of a divorced adulteress with her paramour. He maintained silence on the question of Ireland. On 14th April, 1801, he succeeded Lord Loughborough as Lord Chancellor. In accepting the office during the King's mental trouble he considered that he was bound to hold it subject to the King's decision on his recovery, and in consequence did not resign the Chief Justiceship. It was not till 21st May that the Common Pleas had a new President in the person of Lord Alvanley.

During Eldon's first tenure of the Woolsack his

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opposition to change was constantly in evidence. He was engaged in defeating proposals to abolish the slave trade, and imprisonment for debt, and to bring about Catholic Emancipation. In 1804 he was busy composing feuds in the Royal family, a task for which he was eminently qualified. No account of his life can be adequate which does not lay due emphasis on his power to conciliate and win over men with whom he was brought into conference, a quality which made him one of the most powerful men in any Cabinet in which he found a seat. On 7th February, 1806, he resigned, much to George's regret. He said : " I admit that you cannot stay when all the rest have run away." During that year he was much occupied in advising Caroline, Princess of Wales, taking little part in active politics. His means were ample. The savings of a lucrative practice were supplemented by a pension of £4,000 a year, a sum enormously in excess of the present pension of a Lord Chancellor when due allowance is made for the changed conditions. The emoluments of that office were then actually far in excess of the present day. Fees and perquisites came to over £20,000 a year, though the salary and other costs of the office must be deducted to arrive at the true figure.

After a short interval, he began, in 1807, his second term on the Woolsack, which lasted nearly twenty years. There were many changes of Administration, but he continued, until at last it seemed as though he had a life tenure of the office. In the Cabinet he exercised a paramount influence, and must be awarded much of the praise for the work done, and an equal share of the blame for the mistakes and errors of the Government. He advised and supported the seizure of the Danish Fleet at Copenhagen in 1807, the legality and propriety of which is still discussed among international lawyers. He advised and supported too those British Orders in Council which formed our answer to Napoleon's Milan and Berlin decrees,

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and which became precedents to support the retaliatory Orders in Council made during the late war. Less admirable was the claim to search neutral vessels for British seamen, which led to the war with America in 1812. He disliked Canning, and took the first opportunity in 1809 to oust him from the Cabinet ; the mutual dislike of the two men did the country no good. In 1810, when the King was attacked with his last mental illness, Eldon was on bad terms with the Prince of Wales, but once the latter became Prince Regent the former's powers of persuasion were so great that he soon acquired a permanent ascendancy over the latter, throwing the Princess of Wales overboard as a necessary condition. It was Eldon who arranged the marriage of Princess Charlotte. In 1811 he was the object of bitter attack on the ground that he had affixed the Great Seal to Statutes and Commissions when George III was too ill to assent to anything in 1804 ; but the attack was misconceived and proved abortive.

Having become notorious for his aversion to change, it is interesting to note that at this stage of his life even he supported certain legal changes. In 1815 trial by juries in civil cases was extended to Scotland. In 1819 trial by battle and appeals for treason and felony were abolished. The last reform was opposed by Radicals on the ground that it infringed the liberty of the subject ! The fears expressed have proved groundless. The institution has vanished so completely that it is, perhaps, necessary to explain that in those days an acquittal for murder was not conclusive. Certain near relatives of the deceased could " appeal " against the acquitted prisoner and the whole issue must be tried again before a jury. The reason for the abolition was that in Abraham Thornton's case a clear acquittal was challenged by way of appeal. The Courts were bound to allow this vexatious reopening of the matter. The accused, or " appellee,"

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was advised that trial by jury could only be held by his consent, and he, therefore, refused to allow such a trial. The only method allowed by the law in such an event was trial by battle, and, accordingly, the appellee attended in Court with a rusty gauntlet and challenged the accusers. This proved the end of the case, and the obvious absurdity of the archaic procedure led to its prompt abolition.

This was the solitary legal reform in England which Eldon supported. So averse was he to change that he once wept on the Woolsack when a Bill was passed to declare that some pitiful larceny was no longer to be visited with the death penalty. The old man thought that an ordered universe was shivering into fragments.

1819 was the year of the "Peterloo Massacre," and Eldon lent all his support to the "Six Acts," intended to suppress all agitation and reform. Ministers had become most unpopular, and this contributed in no small degree to the desperate and abortive Cato Street Conspiracy in 1820.

Now began a fresh chapter in Eldon's life. The Prince Regent ascended the throne in 1820 as George IV, and in 1821 rewarded Eldon by an Earldom. The Coronation was attended by an unwonted scene. Caroline, Princess of Wales, had long since been estranged from her husband and was living abroad. She had now become Queen, and claimed to be crowned with George, who was equally determined that she should not. Eldon had been her adviser in 1806, but by 1821 he had become a whole-hearted supporter of George. She attempted to force her way into the Abbey at the Coronation, but was prevented. George, in 1820, had desired to obtain a divorce, and the Ministry had reluctantly agreed to further his desire if the Queen should return to England. She was goaded into action by two public affronts. The Ambassadors had been instructed to prevent her recogni-

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tion as Queen by foreign Courts, and her name had been omitted from the prayers for the King and Royal Family. Compromise proved impossible, and a Bill was promoted. Ministers yielded reluctantly, as they foresaw that there might be disclosures on both sides endangering the Monarchy itself. The Opposition threw itself wholeheartedly into support of the Queen. The charges against her were investigated by the House of Lords under Lord Eldon's presidency during the passing of the Bill. A dangerous crisis was at hand, but eventually the Bill was withdrawn at its last stage in the Lords, and never reached the Commons. For a time it seemed that the King had forfeited all respect and popularity ; but he was speedily to recover his lost position.

Eldon's influence over the Monarch had been shaken by his reluctance to adopt the extreme measures demanded, and on the question of Catholic Emancipation he was countered by the influence of Lady Conyngham, who had been brought to sympathize with that reform. The Ministry was reconstructed, and Eldon had to accept a Coalition ; but his dislike of his new colleagues was mitigated by his success in excluding the hated Canning. In 1822, however, Canning was admitted to the Cabinet, and in 1827 he succeeded Liverpool. This marked the end of Eldon's official career, for he resigned, and held no office thereafter. In 1828 the Test and Corporation Acts were repealed, in spite of his opposition, which was also exhibited vainly when the Catholic Emancipation Bill became law in 1829.

On 28th June, 1831, the aged statesman was prostrated by the death of his wife ; but he pulled himself together for the last great political struggle of his life. He led the opposition in the Lords to the Reform Bills ; and the final triumph of 1832 marked the end of his influence. He survived until 13th January, 1838, when his grandson succeeded to his title and estates. He had

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two sons and two daughters. His personal property amounted to nearly £700,000.

Lord Eldon was a remarkable man in that he attained so commanding a position, and yet had so few outstanding characteristics that it is almost impossible to give a just explanation of the reason for his eminence. Except in law, he was unlearned. He never travelled, and was innocent of marked interest in literature, science, and art. Lord Stowell, on the other hand, was an intimate friend of Dr. Johnson. His merit as an orator was small, and his physical characteristics were not remarkable. He was rather good-looking, and his voice was pleasant, but his speeches were laboured and involved. Horne Tooke said, when there was a question of his obtaining a new trial, that sooner than hear John Scott speak again he would plead guilty. Lady Eldon admired his hair, which, to please her, he wore longer than was the mode. He must have held the same opinion as his wife, for, on becoming Chief Justice, he asked leave to dispense with the judicial wig, but George III refused, saying that he would have no changes in his time. As Lord Chancellor, however, he on occasion exercised the liberty of dispensing with the wig.

He was not unsociable in intimate relations ; but not in the larger sense sociable. He was a good landlord and charitable, though not ostentatiously so. His religious feeling was not excessive. He neglected public worship, and expressed the view that he wished the State to be religious, but not the Church to be political.

His exercise of patronage was injudicious and too subservient to Royal influence. His own reluctance to give silk was intensified by his acquiescence in George's determination to punish the counsel who appeared against him on the Queen's behalf. As so often happens, the penalty fell on the innocent. Brougham was professionally the leader of the Northern Circuit, but silk was withheld



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from him. Litigants insisted upon their solicitors retaining him, and the juniors who were senior to him were thus left out of cases which they would have had were Brougham a silk, and, therefore, able to lead them. There is a story explaining how the Prince Regent obtained a Chancery Mastership for a friend who practised at the Common Law Bar. As soon as the vacancy occurred the Prince went to Eldon's house, where the Lord Chancellor was confined by a slight indisposition. He came into the bedroom and proffered the request, which Eldon refused on the ground of the favourite's utter ignorance of the duties. The Prince took a chair, and expressed his sorrow for Lady Eldon, for, said he, he would remain there until the appointment was made. Eldon yielded, but, contrary to universal expectation, the "job" was a success, for the favoured individual took pains to learn his duties, and administered them with ability.

As counsel, there can be no doubt that his genius was not suited to the rough and tumble of advocacy before juries. He was not a success as an advocate in Crown cases when he was a Law Officer; he showed small aptitude for capturing the attention and minds of the jury. In Chancery, his capacity for drawing distinctions, for discussing subtleties and niceties, and his desire to exhaust all possible aspects of a case, stood him in good stead. He had taken pains to master the law, and his friendship with Lloyd Kenyon (afterwards Lord Kenyon) and Lord Thurlow were powerful levers in his favour. *Ackroyd v. Smithson*, in 1780, where he won his spurs, is an illustration of his reasoning powers at their best. To read his argument is to be convinced, and, thereafter, it is difficult to realize that there could have been any doubt about the matter. He was not always on the winning side. For example, in *Sloman v. Walker*, (1784, 1 Bro. Ch. 418; 2 W. and T. 264), Lord Thurlow held against him that, where a penalty is inserted in a bond to secure the enjoy-

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ment of a collateral object, the penalty is merely accessory ; and, in case of breach of the bond, equity will only award the amount of damages actually suffered, and not the full penalty. Again, in *Dering v. Winchelsea*, (1787, 1 Cox Ch. 318 ; 2 W. and T. 539), the Court held against him that if several sureties bind themselves by different instruments for the same obligation of the same debtor then they must contribute equally, even if, before one of them was called upon to pay, he was unaware that the others were bound. This illustrates the maxim, "Equality is equity," for, if the creditor could select one surety alone, he would charge him and relieve the others, though all are equally bound. It is this principle that Eldon afterwards upheld in *Aldrich v. Cooper*, to which I shall refer later. In Dering's case the decision disappointed Eldon, and, indeed, it ran counter to the commonly received notion of lawyers ; but, in subsequent cases, Lord Eldon mentioned that he afterwards became convinced that the decision was right, and he applied and expounded it in several noteworthy judgments (see *Coope v. Twynam*, 1 T. and R. 429 ; *Craythorpe v. Swinburne*, 14 Ves. 165, 169). In *Scott v. Tyler*, (1788, 2 Bro. Ch. 431 ; 1 W. and T. 560), Scott was counsel for the unsuccessful daughter. It is a case which illustrates how equity was hardening into law. A man had left his daughter a legacy, to be paid to her one half at 21, if she were then unmarried, and the other half at 25 if she were still a spinster. If she married under 21, with her mother's consent, then the whole legacy was to be settled. She caused the whole difficulty by marrying improvidently at 18, against her mother's anxious prohibition, and now came to claim the legacy. There were many cases where former Lord Chancellors had held that these legacies were really portions ; and conditions in restraint of marriage were only *in terrorem* unless there were a gift over or some other provision which made it impossible to disregard the

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conditions. Lord Thurlow, in spite of Scott's arguments based on these precedents, held that the daughter did not come within the terms of the gift and had forfeited all. In other words, the legacy was construed in the usual way. In *Fox v. Mackreth*, (1791, 2 Cox 320 ; 2 W. and T. 722), Scott was successful in establishing that a trustee must not make a profit out of his trust. The defendant was trustee to sell estates to pay debts. He purchased the lands for himself, and before completion of the purchase resold at a profit. It was held that he must account for that profit. I have limited these cases to such as are now leading cases constantly cited in the Courts. His practice was enormous, and there was hardly a case in the Chancery Court in his day in which he was not concerned on one side or the other.

As Chief Justice of the Court of Common Pleas he was a success. He was, as always on the Bench, patient and judicial. Quick in apprehension, with a retentive memory aided by vast technical learning, he brought sound judgment, a subtle mind, and unwearying industry, to aid him in the discharge of his duties. In this Court he established a reputation for sound law and quick decision ; his only fault was that, in summing up, he was apt to be too technical and subtle for the jury to grasp clearly the principles governing the issues of fact they were to decide. His tenure of the Chief Justiceship was not marked by any outstanding case of importance, and the instances I have selected are of general rather than of technical interest.

In *Cook v. Loveland*, (1799, 2 B. and P. 31), the plaintiff was a baker in Commerce Road, Blackfriars Road, and he sued the Master and one of the Wardens of the Bakers' Company for trespass in breaking into his shop. The Crown had authorized the Master and Wardens (of whom there were four) of the Company, or deputies appointed by them, to overlook and control baking in the

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City and within adjoining districts, and the defendants justified their entry under these powers. But, as Eldon pointed out, they were only two out of five, and could only act by a majority. Even if they claimed to act for the others the decision of the majority that they should so act must be shown, and so the baker won.

*Whaley v. Paget*, (1799, 2 B. and P. 51), was an action on a wager. Paget had matched his filly, "Little Devil," to beat the best of the plaintiff's horses, "Billy" and "Allsteel," on a journey from London to Sittingbourne. "Little Devil" lost, but in the action Paget won. Horse-racing for stakes over £50 had been allowed by law, but Eldon decided that only referred to horse-races held in the usual manner and in suitable places, not for matches on the King's highway.

*Martin v. Kennedy*, (1800, 2 B. and P. 69), turned on a piece of sharp practice which the Court found itself unable to prevent. Two men had been libelled in *The Morning Chronicle*, and each had sued a different person engaged on the publication of the paper. Each obtained a verdict, and then each started a fresh action against the other defendant. There was no law against this, and so the actions were allowed to proceed.

*Beard v. Webb*, (1800, 2 B. and P. 93), turned on the custom of the City of London, whereby a married woman trading apart from her husband could sue or be sued without her husband. Eldon elaborately reviewed all the authorities, and held that the custom only applied in actions in the City Courts. In the superior Courts the husband must be joined in accordance with the common law (now altered by Statute).

*White v. Wilson*, (1800, 2 B. and P. 116), was an action for wages by one of the crew of a slaver. He claimed money and the average price of a negro slave. The agreement had to be in writing, and in the document no mention was made of the slave. The Court declined

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to listen to the plea that it was usual to make a bargain about slaves, and such a bargain was never mentioned in the document. The Statute required the agreement for the seaman's wages to be expressed in a written document, and this bargain was not there.

*Gibson v. Chaters*, (1800, 2 B. and P. 129), was an action for maliciously holding to bail for a civil debt. Chaters was a master mariner. He did not pay his debt, and so the plaintiff took steps to enforce it. Chaters paid the plaintiff's agent at North Shields and then sailed for London. He was arrested for debt on his vessel arriving in the Thames, and had to give bail. He lost the action, as it was obvious that the arrest was made in ignorance of the payment, and there was no evidence of malice.

*Lord Petre v. Lord Auckland*, (1800, 2 B. and P. 139), decided against the right of a Roman Catholic peer to exercise the Parliamentary privilege of franking letters. As a Roman Catholic he could not sit in the House of Lords, and Lord Eldon decided, after an exhaustive review of the history and authorities, that the privilege was only given to peers entitled to sit and vote.

*Marsh v. Hutchinson*, (1800, 2 B. and P. 226), was a case arising out of the war. Hutchinson was employed at Brille, in Holland, as agent for English packets, where he was also engaged in growing madder. On the outbreak of war he sent his wife and family home, but stayed to look after his madder. The plaintiff sued Mrs. Hutchinson as a feme-sole, on the principle that she was the wife of a foreigner living abroad, but the Court held that that was not possible since she had not represented herself to be a feme-sole.

*Saunderson v. Jackson*, (1800, 2 B. and P. 238), was an action for the price of wine. The point was whether a bill of parcels in which the name of the person ordering the goods was printed was a sufficient note in writing signed

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by the party to satisfy the Statute of Frauds. The Court held that a printed signature was sufficient.

*Handcock v. Baker*, (1800, 2 B. and P. 260), was a curious case. The defendants were passing the plaintiff's house when they heard a disturbance and a woman's voice calling "Murder." They broke in and found the plaintiff making murderous attacks on his wife, and forcibly restrained him. As he would not be quiet, and threatened to repeat the offence, they took him into custody and eventually handed him over to a constable. He sued them, and they pleaded that the circumstances justified them, and the Court thought so too.

*Morris v. Langdale*, (1800, 2 B. and P. 284), is a case of slander. Langdale said, "Morris is a lame duck." Morris was a stock jobber, and the expression meant that he did not fulfil his contracts. He got no satisfaction because, though Lord Eldon was convinced that stock jobbing could be a lawful occupation, he had not pleaded clearly enough to show that he was engaged in the lawful, and not unlawful, variety of that avocation.

*Astley v. Weldon*, (1801, 2 B. and P. 346), is a decision, of the now familiar type, that a penalty to secure performance of a contract, including small money payments, would only avail to the extent of the actual loss. Astley owned theatres in London, Liverpool, and Dublin. Fanny Weldon, the defendant, was engaged by him to act at his theatres for the princely salary of £1 11s. 6d. a week, and actual travelling expenses.

Most of these decisions would be the same to-day, and, even where they would not be followed, the difference is due to changed ideas. Nevertheless, as already remarked, it cannot be said that Eldon's term in the Common Pleas was marked by any decisive or outstanding cases.

When his work in the Court of Chancery is considered, many factors have to be taken into account. In contrast to his reputation as Chief Justice of the Common Pleas,

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as Lord Chancellor he was notorious for delay. He was wont to go into all conceivable aspects of a case, even after the actual issue had been completely discussed. He overlaid his decisions with so many distinctions and refinements that the principle is often difficult to discover. Often, after delivering judgment, he reconsidered the case, and litigants began to believe that the Lord Chancellor positively disliked coming to a decision. Sometimes the delay was so great that the object of bringing the suit was defeated. It is even said that once he lost the papers so that no decision was ever given. It was not all Eldon's fault. The procedure had long been dilatory, and the volume of work was increasing. Moreover, he had many distracting duties. Several important peerage cases absorbed much of his time, and the Queen's trial proved a scourge to litigants who were anxious to get their cases heard. The practice of rehearing cases already decided by the Master of the Rolls was another cause of delay, especially as the cases were reheard, and not merely re-argued as on appeals. But, when all allowances are made, Eldon was unforgivably slow. It was not without sound reason that the Barons forced John in Magna Charta to promise not to delay right and justice. Redress not given until too late is illusory. During the second Chancellorship steps were taken to relieve the pressure of his duties. A Deputy-Speaker of the House of Lords was appointed, and a Vice-Chancellor was created by Statute to take over some of the cases. The latter expedient was less successful than it should have been. The first Vice-Chancellor, Plumer, was slower even than Eldon ; and his successor, Leach, was so hasty that jesting lawyers suggested that he could occupy his spare time in relisting the cases he had determined in order to hear the other side. The word went round that Eldon was "*oyer sans terminer*," and Leach "*terminer sans oyer*."

There can be no doubt that Eldon was reluctant to

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dispose of a case until no lingering fear tormented his mind that he might possibly be wrong. As he put it himself: "I always thought it better to allow myself to doubt before I decided, than to expose myself to the misery of doubting whether I had decided rightly or wrongly." He shut his eyes to the misery of uncertainty that litigants suffered, often for years, and the Court of Chancery sank in reputation until a threat to throw a matter into Chancery sent cold shudders down one's back. Yet, with all this, Eldon was usually right. Few of his decisions were ever appealed to the Lords, and still fewer were reversed. In the course of his long judicial career he reviewed practically the whole range of equity, and by the time he left office it had become a system of law. Cases were argued on authority and precedent, just as in the Common Law Courts. The work of previous Chancellors was completed and common law and equity henceforth co-existed as distinct systems; the latter had, indeed, ceased to correct the rigours of the former. Within fifty years it was perceived that this co-existence had no longer a *raison d'être*, and the Judicature Act, 1873, recast Chancery, so that its matters are now subjects assigned to the Chancery Division, and all the Courts can give equitable remedies. The change has been a loss to the Bar, which has almost forgotten that the common law built up the main principles of land tenure, and that conveyancing was once a part of the avocation of a common law practitioner, who in these modern days tends more and more to be less a learned lawyer than an advocate on issues of fact.

To illustrate Lord Eldon's work as a Chancery Judge, I have chosen cases which are leading cases retained in the last edition of *White and Tudor*. By so doing my selection has been restricted to decisions of admitted importance and of present value. No selection can do justice to the whole range of his judicial activities, but it will serve to illustrate his merits as a judge.



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*Ellison v. Ellison*, (1802, 6 Ves. 656 ; 2 W. and T. 853), lays down the principle that equity will not interfere to force a man to carry out a promise to create a trust where he had made the promise voluntarily without valuable consideration. A man who is merely benevolent is allowed to repent himself of his benevolence. But if he has once created the trust, then equity will see that it is enforced, for the trust shall not fail though the trustee fails.

*Seton v. Slade*, (1803, 7 Ves. 265 ; 2 W. and T. 478), shows that equity will not regard time as of the essence of a contract as the common law did. If one party delays and the other does not take the proper steps, then he will not be allowed to repudiate the bargain merely by reason of delay. In the case in question parties had agreed to sell and buy land. The purchaser had intimated that he would hold the vendor to the time named, but when the abstract of title was delivered late he received and kept it without objection, and only repudiated later. The vendor was held entitled to specific performance, but, as "He who seeks equity must do equity," he was ordered to compensate the purchaser for the delay. What right had the purchaser to keep and read the abstract if he intended to say that it was too late, asked the Chancellor. He should have returned it at once unread.

*Howe v. Dartmouth*, (1802, 7 Ves. 137 ; W. and T. 68), is so well known that it is constantly cited merely by mentioning its name. The rule in *Howe v. Dartmouth* is that, if residue of personalty is bequeathed to persons in succession to one another, and is not invested in authorized securities, then, unless a clear intention to the contrary appears, that property must be sold and invested in authorized securities. In that way the tenant for life is secured the income, and the reversioner is assured of the capital. The rule cuts both ways. Some property yields a large present income, but the capital value is

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depreciating, as in the case of short leaseholds. The tenant for life in such a case is prevented from enjoying an income, part of which is really wasting capital. On the other hand, some property yields little or no income, but in time will result in a large access of capital such as reversionary interests. The rule secures in such a case that the tenant for life shall not lose the benefit intended for the profit of those who come after. The rule only applies to wills, and the testator can, of course, modify it to agree with his intentions.

*Aldrich v. Cooper*, (1803, 8 Ves. 381 ; 1 W. and T. 35), is the leading case on "Marshalling of Assets." It can best be explained by an illustration. One creditor may be secured by being entitled to payment out of two funds, while another is entitled, subject to the rights of the first creditor, to payment out of one only of those funds. It is obvious that the first creditor, by obtaining payment, as he is entitled to do out of the fund to which both may have recourse, may exhaust that fund wholly or in part, and to that extent diminish the resources of the second creditor. Equity will not intervene to prevent his doing so, but in certain conditions will intervene to prevent injustice resulting by enabling the second creditor to have recourse to the other fund to the extent of his disappointment. Equity will not allow one creditor to disappoint another. This case is an illustration of the same rule as was applied in *Dering v. Winchelsea*, to which I have already referred.

*Murray v. Lord Elibank*, (1804, 10 Ves. 84 ; 1 W. and T. 654), turned on the obsolete "wife's equity to a settlement," but is retained as a leading case for its illustration of the maxim, "He who seeks equity must do equity." The common law handed most of the wife's rights over to her husband on marriage, unless the lady's friends had seen that a settlement had been executed. Equity could not interfere with the husband so long as

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he exercised his common law rights, but if, in order to secure his wife's property, he had to come to a Court of Equity, that Court would give him no redress unless he consented to make a proper settlement on his wife and children. The wife could waive this equity, and then the children got nothing. In the actual case a decree had been made, but the wife died before the settlement had been executed. Lord Eldon ruled that it did not matter. The children could be defeated by waiver, but death was not a waiver. The decree had been made before the death, and must be carried into effect.

*Brice v. Stokes*, (1805, 11 Ves. 319 ; 2 W. and T. 631), is a warning to trustees. A trustee signed a receipt with his co-trustee. He handled none of the money, but he let his co-trustee do with it what he liked. The money was lost and the innocent trustee was made to pay. Not because he signed the receipt, for, unlike an executor, a trustee can always show that he never received the money, but because by his subsequent action he permitted a breach of trust.

*Huguenin v. Baseley*, (1807, 14 Ves. 273 ; 1 W. and T. 259), is the weapon used to force to disgorge their ill-gotten gains against those who worm themselves into the confidence of wealthy people who by age, illness, or inexperience are peculiarly liable to be imposed upon. In this case Lord Eldon set aside a settlement made by a confiding widow upon a clergyman and his family as a result of his pretended interest in her welfare and a real one in his own. The facts are not material. He pointed out that the question was, not whether she knew what she was doing, but whether she was not being influenced against her interests by persons pretending to look after her. It was the abuse of confidence that justified the decree. The decision has often been acted upon, and persons in a confidential position cannot be too careful to see that any benefit conferred upon them is given after proper independent advice given to the donor.

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*Mackrath v. Symmonds*, (1808, 15 Ves. 329 ; 2 W. and T. 946), turns on a vendor's lien for unpaid purchase money. This lien is equitable and arises independently of contract. It is good against all but subsequent purchasers for value without notice on the principle, *Qui prior est tempore potior est jure*.

*Agar v. Fairfax*, (1811, 17 Ves. 533 ; 1 W. and T. 192), lays down the principle upon which a Court of Equity would grant partition as between co-owners. It was not that there was no right to partition at common law, but the procedure for enforcing partition at law was so difficult. There is some ground for believing that the Court of Chancery always had concurrent jurisdiction. In 1833 the right to enforce partition was given altogether to the Court of Chancery and under the Judicature Act, 1873, such actions are now assigned to the Chancery Division.

*Ex-p. Pye*, (1811, 18 Ves. 140 ; 2 W. and T. 369), illustrates the doctrine of ademption. There is a presumption against double portions, and, consequently, if a parent makes a will giving a legacy to a child and afterwards gives that child a portion to establish him, as for instance a marriage portion, then the portion is taken to be given on account of the legacy unless a contrary intention is clearly shown. The rule applies to all legacies and gifts by anyone *in loco parentis*. It does not apply in other cases, so that if the legatee is not a child or *in loco filii* both the portion and the legacy are due unless a contrary intention is clearly shown.

*Ex-p. Waring*, (1811, 19 Ves. 345 ; 2 W. and T. 569), is a case where Eldon cut a Gordian knot. A creditor is not as a rule entitled to a surety's securities given to him by the principal debtor. Where A and B are both parties to a bill of exchange, each is liable to the holder (C). But as between A and B, A may be the person ultimately solely liable, so that B is a quasi surety for A.

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Suppose A gives B securities to secure payment by A and both A and B go bankrupt before the securities are realized. Their rights, of course, pass to their respective trustees in bankruptcy. A was entitled, on paying C in full, to obtain his securities back again. B, on the other hand, if he paid C, was entitled to realize them. Now C can prove, as an unsecured creditor, in both bankruptcies. Neither trustee can pay in full and insist on the equities, and, on the other hand, until the estates are wound up it is impossible to know how much each estate does pay to C. There is an administrative deadlock. In these circumstances Lord Eldon decided that the fair thing to do was to apply the securities towards paying C, and any balance left owing could be proved for. In this way C, though unsecured, obtains the benefit of securities which were never meant for him. The result is not ideal justice, but the rule has worked ever since and so may be justified as a common-sense solution of a legal impasse.

These cases show that Lord Eldon was actuated by a sincere desire to apply the principle of equity in a judicial manner and that he succeeded in that desire. He was not an innovator. No new doctrine of equity was devised by him. The importance of his work is that he revised equity and completed the work of reducing it to a coherent system of law, the rules of which are capable of development to meet altered circumstances but which cannot be added to without the sanction of Parliament. The growth of equity had ended. The plant had reached maturity. The time was at hand when the judge who had built up that system should leave the administration of equity to others and confine himself to the work of appeal, and in due course common law and equity were fused to become the single, if complicated, body of judicial law which is administered by His Majesty's Courts.

Lord Eldon earned the respect of his contemporaries in the law. In December, 1833, in an action for false

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imprisonment against the Lord Chancellor, Eldon was subpœnaed to give evidence. On his entering the Court the Bar rose and remained standing while he gave his evidence and until he had left the Court, not before the Solicitor General had expressed in the name of his brethren the satisfaction they felt at seeing him once more among them. When he died Greville noted in his *Memoirs* :—

Lord Eldon died last week full of years and wealth. . . . Like his more brilliant brother, Lord Stowell, he was the artificer of his own fortune, and few men ever ran a course of more unchequered prosperity. As a politician, he appears to have been consistent throughout and to have offered a determined and uniform opposition to every measure of a Liberal description.

Then, after adverse criticism of his political principles, Greville continued :—

He was a very cheerful, good-natured old man, loving to talk and telling anecdotes with considerable humour and point. I remember very often during the many tedious hours the Prince Regent kept the Lords of the Council waiting at Carlton House that the Chancellor used to beguile the time with amusing stories of his early professional life, and anecdotes of celebrated lawyers, which he told extremely well. He lived long enough to see the overthrow of the system of which he had been one of the most strenuous supporters ; the triumph of all the principles which he dreaded and abhorred ; and the elevation of all the men to whom, through life, he had been most adverse, both personally and politically. He little expected in 1820, when he was presiding at Queen Caroline's trial, that he should live to see her Attorney General on the Woolsack, and her Solicitor General Chief Justice of England.

Such was Eldon : one of a diligent, subtle mind, impatient of innovation, rigidly adhering to old practices and ways. Had it not been that the times needed a single-minded, obstinate, accurate, and plodding lawyer, who would devote his whole life and energies to the maintenance of existing institutions, it is probable that he would never have attained so high a dignity. Surpassed as an advocate

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and as an orator by others, it is whispered that he was inferior as a lawyer to Grant, his Master of the Rolls, who was his fellow-worker in the great task upon which his fame rests. He failed, as so many have failed, to realize that he had completed his work, and that the people longed to be relieved from his obstinacy and procrastination. Once he had given place to men more in accord with the spirit of the times, he gained prestige though not popularity, and, when he died, men remembered him with affection as a sturdy old man who had the courage of his opinions and maintained them with unabated vigour all the days of his life.

He anticipated, if I may be allowed the expression, many of the qualities of Lord Halsbury ; and enjoyed even a longer period for their exhibition.

I like to recall that even a venerable and learned Scotchman had his weaknesses. He would linger with satisfaction over a bottle of port, perhaps, over a second ; and, when his country house was burned down, and the maid servants scurried down ladders in their shifts, two independent observers noted that the old Lord Chancellor witnessed the descent with relish.



THE RT. HON RICHARD, BARON WESTBURY  
LORD HIGH CHANCELLOR.

Engraved by D. J. Pound from a photograph by Mayall.





## LORD WESTBURY

**B**OTH the common law and equity had by the end of the eighteenth century arrived at that stage of development when conscious innovation became the work of the legislator, and the judge, though in applying he may also in truth be inventing the law, disclaims any title to make new rules. The first half of the nineteenth century saw more and more changes in private law made by Parliament ; nor has the process diminished since. That half century was marked by tentative changes in procedure and practice, which eventually were superseded by the Judicature Act, 1873, and the procedure which it introduced, or which has been made under its authority. The Courts of Common Law remained separate from one another and from the Court of Chancery. Each Court still had its own peculiarities ; but the inevitable march of events was leading to the amalgamation of the Superior Courts, the assimilation of practice to a single system of procedure, and the fusion of law and equity. Many Statutes were passed to provide quicker and less technical methods of arriving at a decision ; more direct and less costly ways of correcting erroneous decisions. A marked tendency develops to codify the Statute Law and to remove from its huge bulk obsolete and unnecessary traditions which encumbered and obscured the rules enacted by Parliament. The Bar, too, during this time, entered upon a period of transition which ultimately resulted in the Inns of Court gaining the sole right to call advocates in the Superior Courts, owing to the disappearance, on the one hand, of the Serjeants at Law, and, on the other, of the Advocates in Ecclesiastical Courts ; and also turned

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the attorney, solicitor, or proctor of the eighteenth century into the solicitor of the latter part of the nineteenth.

It was while all these changes were in the making that Lord Westbury flourished. He made his mark as an advocate—cynical, fearless, sinister, dreaded alike by Bench and Bar. He acquired fame as a Parliamentarian and renown as a judge. By his methods and manners he gained notoriety, aroused enmity, and caused amusement, so that even to this day he lives in the anecdotes of the Bar. At the height of his fame, he was compelled to lay down the office for which he had longed, so that it even seemed that he would be remembered in the company of Bacon and Macclesfield as a venal judge who betrayed his trust. But his fault, though heavy, was not disgraceful. When he retired, he vindicated his honour, and within a few years regained a position which, though not so exalted as that he had lost, gave him power and influence in the counsels of the realm, and in the ultimate Court of Appeal.

Richard Bethell, first Lord Westbury, was born on the 30th June, 1800, at Bradford-on-Avon, in Wiltshire, a town where his grandfather and great-grandfather had spent their lives. His father, Richard Bethell, M.D., of Bristol, was a man of ability who sustained reverses of fortune whereby the prospect of the future Lord Chancellor might have seemed hopelessly blighted. The family was apparently Welsh by origin, if, at least, the tradition be true that the name was originally Ap Ithiel. Some connection seems to have existed with the Slingsby family of Yorkshire, but the name Slingsby, which the Lord Chancellor gave to one of his sons, is probably reminiscent of that Slingsby Bethell whose political activities attracted much attention under the Restoration.

The boy was educated at Corsham, near Bath, and at Bristol, where he showed exceptionally precocious intellectual development. So marked was his progress that when

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barely fourteen he gained a scholarship at Wadham College, Oxford. He was deemed too young to take the oath of obedience, though he had to subscribe to the Thirty-nine Articles.

While at Oxford, where he studied classics, he found that his father could no longer maintain him at the University, and from his seventeenth year he assumed the duty of maintaining himself, achieving that result by coaching other men. In his eighteenth year he graduated with a first in classics, and a low second (equivalent to a third nowadays) in mathematics. His achievement is almost unique, being rivalled only by the successes of Gladstone, Keble, and Philpotts.

At first he remained at Oxford, striving for a Fellowship. After a disappointment at Oriel, where Newman was successful, he was elected a Fellow of his own college, for which he cherished an affection throughout his life, dating his prosperity from the moment when he gained his scholarship there. Though he excelled in classics, and might have become an institution there, he felt that he was fitted for a forensic career. With the aid of the Vinerian Law Scholarship he entered at the Middle Temple, where he was called in 1823. His successor as a scholar of Wadham, a Vinerian Law scholar, and upon the Woolsack, may be allowed, however humbly, to call attention to these coincidences.

He elected to practise in the Courts of Equity. At that time there were three Chancery judges : The Lord Chancellor (Lord Eldon), the Master of the Rolls (Sir Thomas Plumer), and the Vice-Chancellor (Sir John Leach). The Equity Bar was small and select, so that it took years to attain a leading position. In spite of this handicap, Bethell was soon in active work, pushing his way ruthlessly with scant regard to the age or reputation or feelings of his colleagues at the Bar. He was never at any time self-conscious, nor did he have any regard or

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pity for those who stood in the way of his advancement. He was superior to them in ability and force, and took no pains to conceal the fact from those whom he shouldered out of his way while blistering them with his vitriolic wit. He had an early opportunity. An action had been commenced against Brasenose College. The College, as is eminently proper, took the advice of eminent counsel, who counselled compromise. The head of the College, however, remembered Bethell's ability in classics, a sufficient recommendation to obtain his opinion. Bethell advised uncompromising resistance to the suit. His advice was taken, and the College won right up to the House of Lords. (*Att.-Gen. v. Brasenose College*, 2 Cl. and F. 295). Other briefs followed, especially as judicial changes removed the leaders in the Court ; by the time he had been called ten years he shared the bulk of the work in Chancery with two others. In 1840 he took silk, and next year the two rivals became judges and left him the unchallenged leader of the Equity Bar. He had made over 100 guineas in his first year. By 1825 he was in a position to marry, though thereby, as the rules then ran, he forfeited his Fellowship at Wadham ; and as a leader he is said to have made over £20,000 a year for many years ; rumour, however, in the matter of the earnings of silks is more than usually a lying jade. The Income-Tax Commissioners would perhaps be a safer guide.

Taking silk involved his electing to practise in one only of the Courts of Equity, and he chose that of Vice-Chancellor Shadwell. That judge was notoriously always led by the nose by one of the counsel in his Court ; and the fact that he and Bethell were personal friends did not militate against the new silk gaining complete control over the judge. The control was almost tyranny, for Bethell dominated the Bench as well as the Bar, sparing no one's feelings. So much was he hated that one, Mr.

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Neate, was goaded to actual violence, and only saved himself from expulsion by retiring from practice. It is said that in after years Neate, as a Member of Parliament, took the decisive steps which led to his enemy's retirement from the Woolsack, achieving revenge after years of waiting.

In 1846 Bethell was gratified by being made Standing Counsel for Oxford University. In the following year, at the age of 47, he made his first attempt to enter Parliament. He stood at Shaftesbury as a Liberal-Conservative, but was defeated. As time went on his Conservative element gradually disappeared. In 1851 he was elected for Aylesbury as a Liberal, and, in 1852, transferred to the more militantly Liberal town of Wolverhampton, an industrial constituency for which he sat until he was made a Peer. There was, however, always a lingering doubt whether his politics were not a deliberate choice to serve his ambitions rather than the result of conviction. When a man attains a great position and attracts great enmity, it is easy to attack his sincerity, and there seems to be no reason to doubt his political belief. It is true that in later years he once delivered himself of a panegyric on primogeniture, but the succession of all children instead of the eldest son to an intestate father's realty has not been a prominent feature of Liberal or Radical programmes.

It is believed that, when Sir Lancelot Shadwell died in 1850, Bethell refused the succession. In 1851 he attained judicial rank by being appointed Vice-Chancellor of the Duchy of Lancaster, an office which confers jurisdiction in Equity in the County Palatine. But he did not hold that office long. In 1852 he became Solicitor General, and resigned the Vice-Chancellorship. From 1852 to 1862, with a short interval in 1858-9 during Lord Derby's Administration, Bethell was a Law Officer. This period was marked by many important legal changes. There were passed Statutes dealing with the procedure in the Courts of Common Law and Equity. Bethell was

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advocating codification, the fusion of law and equity, registration of land, the re-organization of legal education, and many other projects which have been realized.

The Government of 1852 contained so many men of ability that it was named the "Ministry of All the Talents." Bethell had first become a Member in 1851, but so rapidly did he acquire a knowledge of Parliamentary forms and tactics that he at once became one of the leading debaters in the House. As at the Bar, so in politics, he became one of the foremost, both feared and hated. In 1853 Gladstone introduced a new project for death duties, now known as the Succession Duty Act, 1853, and still to be reckoned with by those who succeed to property on the death of others. The Chancellor of the Exchequer applied for help to Sir Alexander Cockburn, the Attorney General, but Sir Alexander was wary, and offered the Solicitor General. In the debates Members were amazed at the extent of Bethell's legal knowledge, his grasp of principle and detail, and his powers of luminous and exact exposition of technical rules. After the Bill had passed into law, Gladstone wrote to him in 1855: "I have found your kindness inexhaustible and your aid invaluable, so that I can ill tell on which of the two I can look back with the greater pleasure. The memory of the Succession Duty Bill is to me something like what Inkerman may be to a private in the Guards; you were the sergeant from whom I got my drill, and whose hand and voice carried me through." The tribute came from an old Parliamentary hand to a Member new to office and in his third Session. Gladstone must have forgotten this when he afterwards said that Bethell was the least reliable Law Officer he had worked with. In the meantime they had differed. The old fox had forgotten a famous old hunt.

In 1854 Gladstone was again calling upon him for help in the Oxford University Bill, and expressed his thanks in terms of warm affection. Bethell was also

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inducing the Inns of Court to consolidate their regulations and to introduce studentships. The old study at the Inns of Court had ceased, and he was striving to re-create the teaching of law. When the Council of Legal Education was formed, he became the first chairman.

In November, 1856, he was made Attorney General. Next Session he was put in charge of the Bills dealing with the Courts of Admiralty, Probate and Matrimonial Causes. The Bill introducing judicial divorce aroused storms of opposition in which Bethell revelled. His bitter tongue and uncompromising attitude inflamed opponents, and the passage of the Bill was marked by fierce and turbulent speeches. Gladstone led the opposition, and was cut to the quick by the Attorney General's accusation of insincerity. He retorted that Bethell was but a hewer of wood and a drawer of water for the Cabinet, and showed his wound by referring to "the accusations of insincerity which have not only proceeded from his mouth but gleamed from those eloquent eyes of his." Bethell emerged triumphant, and his measure, with but slight subsequent alteration, fixed the law of divorce as it stands at this day.

Bethell was by now a man whose lightest word attracted attention, but he did not modify his methods. He spared neither colleague nor opponent who crossed his path. He openly stated his opinion that the House of Lords was not an efficient Court of Final Appeal. This so infuriated the Lord Chancellor that Lord Campbell called the Prime Minister's attention to the harm done by the antagonism thus created. Bethell did not escape rough handling himself, and in 1858, while out of office, publicly complained that Lord St. Leonards had misrepresented him. It was not the only occasion upon which that legal authority stated his views in opposition to Bethell's in the plainest language. In 1859 Palmerston was back in office and a formidable debater in opposition. In 1861 Lord



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Campbell was favoured, and, in his chagrin, Bethell rebelled against becoming Attorney General again. He was persuaded, however, to come back, for Palmerston had no desire to have such a formidable debater in opposition. In 1861 Lord Campbell died, and Bethell became Lord Chancellor, taking as his title the name of Westbury.

His promotion had not been a certainty. The Queen had given her consent with marked reluctance ; and, though the Equity Bar hailed his promotion on his merits as a lawyer, it extended to him no personal sympathy. He soon learned that the Lords would not be browbeaten, but while learning the lesson he underwent several rebuffs.

Now he entered upon the task of passing laws to carry out his projects. He had ardently desired that the Statute Law should be codified. He was an active member of the Statute Law Commission which had reported in favour of revision and consolidation as a less drastic measure. The first Statute Law Revision Act, 1861, removed many obsolete Acts, and the second, in 1863, was moved by Lord Westbury himself. Successive Acts have removed practically all the obsolete statutory provisions, and the work of consolidation has gone steadily on ; but of late years the zeal for codification seems to have died away. He had also taken a leading part in the Commission which sat from 1854 to 1857 on the question of land registration. In 1862 he procured the passing of an Act which proved abortive. It was purely voluntary, and the expense involved was not counterbalanced by a sufficient increase in security of title. Even an improved Act of 1875 was almost an equal failure, and it was not until compulsion was applied in certain areas by the Land Transfer Act, 1897, that much headway was made. Even now professional opinion is divided upon the question whether the public gain a sufficient advantage. His work on land registration is recalled by his arms being placed on land

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certificates with those of the other Lords Chancellors associated with the various Statutes.

The religious controversies which were then raging attracted his eager attention. It cannot be said that he was a religious man, but he was certainly a great religious controversialist. He enjoyed arguing about religion. His utterances were couched in language at once vigorous and devoid of desire to spare the feelings of the clergy ; and it may be doubted whether their tone did not do more harm than good to the side that he favoured. On 15th July, 1864, he enraged the bishops by informing them, in the House of Lords, that they had incurred the penalties of a *præmunire*. It is said that on a friend asking him what that exactly meant, he cheerfully replied that he had not the least idea. On the same occasion Westbury's denunciation of a synodal judgment earned for one of the bishops the nickname of " Soapy Sam," which he was never able to live down.

He had, in 1863, made a rare visit to the Privy Council to preside over the appeals in the " Essays and Reviews " controversy, and his obvious delight in these disputes caused grave misgivings in sober citizens. His judgment was said by the wits to have taken " away from orthodox members of the Church of England their last hope of eternal damnation " and to have " dismissed Hell with costs." These observations are more witty than just. The decision was that of the Privy Council and not his own individual opinion, and, read in calmer days, is not so open to criticism as it then appeared. (*Williams v. the Bishop of Salisbury*, 2 Moo. N.S. 374). His private life did not qualify him to be a protagonist in religious matters, or a judge in matters of social precision. The judges' ladies were embarrassed to find at his banquets a hostess whose title was not derived from matrimony.

With all this controversy whereby he drew upon himself the dislike of many different sections of the com-

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munity, he had acquired a respectable number of active enemies, and few, if any, real friends. Habitually blistering and rendering ridiculous all those who withstood him or obstructed his path, he had ensured that any charges made against him would receive a sympathetic hearing, if substantiated by proof that was not obviously unreliable.

In 1865 rumours circulated in political and legal circles that the Lord Chancellor had been corrupt. Charges were made which had to be met, and many looked forward to a sensational and ignominious dismissal of the hated man.

An inquiry was held. It seems that a clerk in the House of Lords, who had also a post in the Patent Office, had embezzled large sums in his latter capacity. Lord Westbury allowed him to resign and make restitution, though it afterwards was shown that the sum repaid was by no means all that had been misappropriated. At the same time the clerk retired from his position in the House of Lords. The Lord Chancellor took the curious view that the two offices held by the man being quite distinct his misconduct in one was quite irrelevant to his rights to the other, and allowed a Committee to award a pension of £800 without informing them of the misconduct in his other position. The clerkship in the Lords was at once filled by the Lord Chancellor's second son.

There had also been trouble in the Leeds Bankruptcy Court. The barrister who was appointed was competent, but there seemed to be no obvious reason for his appointment. He had, however, previously lent money to one of Lord Westbury's sons, who had given him great cause for anxiety, and the scapegrace seems to have let it be thought that, if he were assisted, the benevolence of those who helped him would receive rewards from high circles. Lord Westbury was easily able to exonerate himself from any suggestion of corruption or personal impropriety, but the Committee, while reporting that he had not acted

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from unworthy motives, deemed that he had been lax and inattentive to the public interest. He offered to resign, but Palmerston refused. When, however, a vote of censure on him was carried by a majority of 14 against the Government's opposition, resignation became inevitable. He announced his retirement in a speech so dignified and moving that a revulsion of feeling occurred. He declared that he was abandoning politics and removing to his Italian villa to spend the remainder of his days. His career seemed to be at an end.

It was not in his nature, however, to remain for ever out of the arena. His fall was not due to causes which could, or should, of necessity, exclude him from public or judicial work, and, in 1866, he was back in England. From 1867 he usually presided at the hearing of Privy Council appeals, and frequently sat in the House of Lords on appeals. In 1868 he was offered a Lord Justiceship of Appeal, which he declined, and in December of that year there was some expectation that he would again become Lord Chancellor. But there is reason to think that Gladstone had not forgiven him the debates on the Divorce Bill, or the observations he had made on ecclesiastical matters. The Irish Church Bill threw him into opposition. Though he accepted the principle of disestablishment, he denounced the measure as one of destruction and confiscation. He did not accept the Irish Land Bill of 1870. He was in sympathy with the Judicial Committee Act of 1871, which strengthened the Privy Council; and he gave whole-hearted support to the fusion of common law and equity and to the reorganization of the superior Courts which were effected by the Judicature Act, 1873, though he did not live to see it come into force. In 1872 he took a strong line in pressing the Government to resist seriously the claim of the United States to compensation for indirect losses, which were eventually excluded by the Court of Arbitration which

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sat at Geneva to award compensation in what is known as the Alabama Arbitration. His last great work was to act as arbitrator in settling disputes arising in the liquidation of the European Assurance Society. He was appointed by a private Act in 1872, and his conduct of the proceedings, though he was a dying man, earned him universal admiration and respect.

So hard and unremittingly did he work that his strength ultimately failed completely, and he died on 20th July, 1873, leaving the work unfinished. He had, however, so far accomplished it that the completion proved almost a matter of detail.

Lord Westbury was married twice : first, in 1825, to Ellinor Mary Abraham, by whom he had seven children who survived him ; and, secondly, on 25th January, 1873, to Eleanor Margaret Tennant, who survived him. His ample fortune went to his two families, of whom one only united a legal to the natural tie.

It is hard to give an accurate idea of Lord Westbury's personality. So much depends on the impression he made on the observer, and he amazed and repelled rather than attracted. He was a curious combination of opposing traits. A notable love of display was tempered by parsimony almost Caledonian in its intensity. Pleasant and even benevolent to those who were not rivals or had not excited his contempt, he was ruthless to all those who opposed him or stood in his path, and if any were so rash as to engage him in verbal warfare he overwhelmed them with an acid wit applied with unerring skill to the topic on which the victim's sensibility was most keen. His superb confidence in his ability and destiny, his vaulting ambition and his bitter tongue led him to spare none and to ask mercy from none. A master of language, gifted with powers of luminous exposition, of great learning, and of unerring skill in discerning the real serious issue, he used his advantages to the utmost. He was feared and hated

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by his colleagues at the Bar whose mistakes he derided, of whom he took scoffing advantage, and whose clients he seduced. Fearless and self-confident, he strode on his way, careless of the load of hatred that he had earned; and when trouble and misfortune came, then, in his hour of need, he found that friends were few and enemies many; and so he brought prematurely to an end the career which he had worked so unceasingly to create. But never, at any moment to any man, did he cringe. The judges never found him more courteous than did the Bar. He criticized them all and bowed to none. The hand of this natural Ishmael was against all men and he feared them not. Yet there were some, men of ability and standing, who called him friend. He could be kindly and even affectionate; and he had a keen sense of duty and strove hard to bring about reforms which he believed to be for the good of the nation.

To describe a barrister whose posthumous forensic reputation depends so much on the impression he made at the time is almost as difficult as to portray a bygone singer or actor. So much depends on personality and on the impression made on the persons to whom he addressed himself. The impression left is domination resented but acknowledged. Yet his lightest remark was made so precisely and mincingly that he was nicknamed "Fanny," and Greville commented on his "niminy piminy" manner; and he was not remarkable in stature. The anecdotes have survived to tell of the incidentals, but little to show how it came that he was able to impress and convince even those who were determined not to be convinced. One thing is certain: few, if any, advocates have had his remarkable ability in the selection and marshalling of facts, related in language so aptly chosen, that the conclusion seems obvious beyond argument. Few have enjoyed the faculty of making the abstruse seem elementary and complications simple, or have been able to combine in the

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same degree cogency with lucidity. His language seems to modern ears somewhat prolix, but we may suspect that it was the added word or phrase that made his argument seem so clear, because it coloured the matter and sharpened the point of his reasoning. One may also suppose that he came to the Bar when advocacy had fallen into a rut and followed hard-and-fast rules, and that he disregarded those rules whenever his instinct told him that they hindered rather than helped his client's cause. To him success came early and remained with him all his days as an advocate. It would, indeed, be difficult to name any important case decided in the Courts where he practised in which he took no part.

His judicial career may be limited to his Lord Chancellorship. He held the office of Vice-Chancellor of the Duchy too short a time to make any mark. He ascended the Woolsack at a time when its occupant still sat as a judge of first instance, and, therefore, his decisions are of two kinds, for he sat in the Lords on appeal, both during his tenure of office and on his reappearance after his fall. He does not seem to have devoted much time to the Privy Council until after Lord Kingstown's death.

His great fault as a judge was that he was too prone to score off counsel or the judges whose decisions fell to be considered. Lord Campbell had for a time defeated his ambition, and he delighted after Campbell's death to set out to test his decisions by "a few elementary principles" and to show that they failed to comply with such a test. So, too, he would sum up counsel's arguments in a few words which revealed his contempt but did scant justice to them. For example, in *Duke of Newcastle v. Morris*, (1870, L.R. 4 H.L. 661), the question was whether a non-trader who possessed privilege of Parliament could be made bankrupt under the now repealed Act of 1861, which Westbury had piloted through the Commons. The relevant action said "all debtors" could be made bankrupt. Lord Westbury summed up the argument thus: "The

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appellant . . . says, first, that it has always been a principle of the Bankrupt Laws to make careful provision for the personal immunity of Members of Parliament, and he refers to the 4 Geo. III and the Statute of 1849 in illustration of the care that has been taken to provide for that personal immunity. He then goes on to assume as a fact that there is no such provision, express or implied, contained in the Act of 1861, as applicable to non-traders being Members of Parliament ; and from the alleged or assumed absence of any such provision he draws the extraordinary conclusion that the Act of Parliament when it speaks of ' all debtors,' did not intend to include therein debtors, non-traders, having privilege of Parliament."

Thus stated the reader is left wondering how such a hopeless contention ever reached the Lords. But the appellant, though wrong, did not put forward that argument. He contended, in effect, that privilege of Parliament existed at common law, and could only be destroyed by express enactment ; that whenever any Statute did interfere with that privilege it did so in express words and with careful safeguards ; and thence he drew the conclusion that the section, because it made no mention of the privilege, did not by its all-embracing words destroy the privilege. One can imagine that counsel were not pleased at this caricature of their careful arguments supported by citation of Statutes and cases.

In the Court of Chancery he sat as a judge of first instance, liable to be reviewed on appeal. His decisions do not, however, differ notably from those which he gave on appeal. I will give three examples :—

*Leather Cloth Co. v. American Leather Cloth Co.*, (1863, 33 L.J. Ch. 199), was a " passing off " action. Lord Westbury decided that in order to complain of an infringement of a trade name the complainant must not himself be guilty of deceiving the public. He said (at page 203) : " I cannot receive it as a rule either of morality or of equity



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that the plaintiffs are not answerable for a falsehood because it may be so gross and palpable that no one is likely to be deceived by it. If there is a wilfully false statement I will not stop to inquire whether it is too gross to mislead . . . The plaintiffs impose upon the public. . . Their request is to be protected in continuing to make these untrue statements in order to secure a monopoly for their commodity. There is a homely phrase long current in this Court, 'that a plaintiff must come into equity with clean hands.' . . ."

In *Suffield v. Brown*, (1864, 33 L.J. Ch. 249), the question was whether the rule that when the owner of land sold part of it he was deemed to grant with that part all the "apparent easements" which he had enjoyed as owner of the whole also applied so that he was entitled to such of them as enured to the benefit of the part that he retained and, consequently, was to be taken to have implicitly created easement in his own favour, though not mentioned in the deed. Lord Westbury said (at page 257) : "It seems to me more reasonable and just to hold that, if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant . . . by the fiction of an implied reservation." And after examining the decisions he finds his solution in "the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made."

*McAndrew v. Bassett*, (1864, 33 L.J. Ch. 561), was a trade mark case, the mark being the word "Anatolia" stamped upon sticks of liquorice. At page 567 Lord Westbury stated his views on the ownership of a trade mark in these words : "First, that the mark has been applied by the plaintiffs properly, that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation ; secondly, that the article

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so marked is a vendible article in the market ; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description." This branch of law is embodied in later Statutes, but I have extracted this definition because it says too little and too much. The Lord Chancellor does not say anything as to the essentials of a distinctive mark, he does not point out clearly that a mark is only protected as to the class of goods dealt in and not as to others, and he adds, as a third limb, something which has nothing to do with ownership but with the right to sue for infringement of that ownership.

Some of his reasons in the House of Lords have become leading principles. In the field of private international law he was a member of the Court that decided the great cases of *Enohin v. Wylie*, (1862, 10 H.L.C. 1), which lays down the principle that the law of the domicile of a deceased person governs the question of his testacy or intestacy ; of *Bell v. Kennedy*, (1868, L.R. 1 Sc. App. 307), which distinguishes between domicile and residence, and lays down the principle that a man retains his domicile of origin until he has acquired another ; and of *Udny v. Udny*, (1869, L.R. 1 Sc. App. 441), where he states the characteristics of domicile and distinguishes between domicile of origin and domicile of choice, and between domicile and political status. Lord Westbury was, however, mistaken in saying that " Civil status is governed universally by one single principle, namely, that of domicile." Quite apart from the fact that the exceptions must be made, the concept of domicile is peculiar to Anglo-Saxon systems of law. Many nations now apply the law of the nationality, and the divergences between the principles applied in different countries have, since those days, given rise to a whole series of problems which are discussed under the name of *renvoi*. But it is by those decisions that our law has definitely adopted the law of the domicile as the general

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rule for deciding questions of personal, as distinct from political, status.

In *Shaw v. Gould*, (1868, L.R. 3 H.L. 55), Lord Westbury was one of the Lords who decided that, where a person not domiciled in Scotland was divorced there and remarried, the children of the second marriage were not entitled to succeed to property in England as the divorce would not be recognized here.

In *Cookney v. Anderson*, (1863, 32 L.J. Ch. 427), as a judge of first instance, he discusses the cases where the Legislature may properly and effectively confer extra-territorial jurisdiction upon Courts.

*Backhouse v. Bonomi*, (1861, 9 J.L. C. 503), settled a point on the right to claim damage for subsidence. The owner of a house claimed damages for injury caused to it through mining operations which had ceased more than six years before the resultant injury was caused. The plaintiff said the damage was essential to a cause of action, and, consequently, time ran from the actual injury. The defendant, however, contended that the mining operations were a complete cause of action, and, consequently, it was too late to sue. It was held that the plaintiff was right. Lord Westbury put the rule in these words: "When the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action then arises and the action may then be maintained."

*Betts v. Menzies*, (1862, 10 H.L.C. 118), was a patent action in which the question of anticipation was discussed. Lord Westbury said (at page 154): "A barren, general description, probably containing some suggested information or involving some speculative theory, cannot be considered as anticipating, and, therefore, avoiding for want of novelty, a subsequent specification or invention which involves a practical truth productive of beneficial results, unless you ascertain that the antecedent publication involves the same amount of practical and useful information."

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This statement shows how Lord Westbury by his qualifications leads one to the conclusion he desires. The adjectives "barren, general" with which he begins lead one instinctively to repel any notion that the "description" could anticipate the "invention" which is "practical" and "beneficial."

*Holroyd v. Marshall*, (1862, 10 H.L.C. 191), turns on questions of equitable assignments. It was a second argument and Lord Wensleydale changed his views. Nevertheless, as it was a decision of Lord Campbell's that was under review Lord Westbury said: "The question may be easily decided by the application of a few elementary principles long settled in Courts of Equity."

*Re States of Jersey*, (1862, 15 Moo. P.C. 195), was an appeal to the Privy Council raising the question whether the Lieutenant-Governor of Jersey had, in the circumstances, the right to withhold assent to a Bill which had passed the States. The practice was merely to report to the Queen, and, therefore, no reasons are given. This and the next following case are the only reported ones in the Privy Council which I have found that Lord Westbury attended while Lord Chancellor.

*Williams v. Bishop of Salisbury*, (1863, 2 Moo. P.C. 374), was the appeal in the "Essays and Reviews" cases to which I have already referred. The judgment is a long one and the doctrines and canons are handled by Lord Westbury exactly as he handled the legal authorities in other cases, a method which, rightly or wrongly, caused much resentment, and could have been done with much less provocation of manner.

*Tapling v. Jones*, (1865, 11 H.L.C. 290), was a case on "ancient lights" in which Lord Westbury laid down clearly and forcibly the principles which govern the opening of new windows and the obstructing of them.

*Blades v. Higgs*, (1865, 11 H.L.C. 621), laid down the

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rule that game chased and killed on A's land is his property, and, consequently, if the poacher sells the game to a third party, A's servants do no wrong if they retake the game peaceably. It had been argued that property in live game was only qualified and could only be made absolute by reduction into possession, and, as the owner had never reduced the rabbits in question into possession, he was not entitled to retake them. The Lord Chancellor disposed of the argument in these words : " If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of a trespasser, that is, of a wrongdoer, should divest the owner of the soil of his qualified property in the game and give the wrongdoer an absolute right of property to the exclusion of the rightful owner."

*St. Helens Smelting Co. v. Tipping*, (1865, 11 H.L.C. 642), is a leading case on the law of nuisance. Lord Westbury there drew a distinction between nuisance producing material damage to property and that which is merely productive of personal discomfort. The latter, he said, must depend on the circumstances of the place where the thing complained of occurs.

*Cooper v. Phibbs*, (1867, L.R. 2 H.L. 149), settled the question whether a misrepresentation as to the rights conferred by a private Act of Parliament came under the head that ignorance of the law is no excuse. The House of Lords decided that it did not. Lord Westbury remarked (at page 170) : " It is said '*In ignorantia juris haud excusat*,' but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But, when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact ; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that that agreement is liable to be

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set aside as having proceeded upon a common mistake. Now that was the case with these parties."

*Lister v. Perryman*, (1870, L.R. 4 H.L. 521), decided that, where the issue of "reasonable and probable cause" arises in an action for false imprisonment or malicious prosecution, it is for the jury to find the facts on which reasonable and probable cause depends, and then for the judge to say whether the facts so found do constitute reasonable and probable cause.

*Overend and Gurney v. Gibb*, (1872, L.R. 5 H.L. 480), was an attempt to fix upon the directors of the Bank the responsibility for the disastrous failure that caused such a memorable financial crisis. It was held that the directors were not liable because they carried out the purpose for which they were appointed.

*Ireland v. Livingstone*, (1872, L.R. 5 H.L. 295), was, according to Lord Westbury, a decision on the meaning of words used in a letter of instructions. The legal profession has, however, treated it as a leading case deciding the reasonable proposition that, if a principal in sending instructions to his agent uses expressions which can be read in two ways, and the agent acts on them, believing them to mean one thing, then the principal will not be allowed to say that he meant the other. As the error arises from his own indistinctness of expression he must bear the loss.

Lord Westbury was not actually a profound, though he was a very brilliant lawyer, and his habit of brushing aside authorities and arguments in favour of a "few simple elementary propositions," stated with lucid precision, often led him to accept as law what was in reality only his opinion of what the law should be. His inability, apparent or real, to appreciate opposing views did not assist him in winning over his colleagues, some of whom were, at least, as satisfied to criticize and refute his findings as he appeared to be to criticize and refute those of others. It is not certain that he was really malicious. He had no great knowledge

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of the ways of the world, or experience in social intercourse, and often he roused people to fury by words which were only intended to be a simple statement of an essential fact as it appeared in his mind. When he replied to a junior, who remarked that he (Bethell) had made a great impression on the Court, "I think so, too. Do nothing to disturb it," he was probably only stating his plain opinion without thinking of the other's feelings. Nevertheless, on occasions there must have been some conscious intention. He said, for instance, of Lord Hatherley, that his mediocrity was unrelieved by a single failing ; of Lord Truro : "If we had a man capable of understanding the most elementary questions of law or equity, there might be some hope of ending the case"; and of Malins : "What a fatal gift is fluency." His command of classics led him into expressions which were more often misunderstood by the Judges before whom he appeared, though there should have been no reason for the Lord Justice interrupting him when he remarked : "Having exposed the *a priori* arguments of my learned friend, I will now proceed to denude the *a posteriori* . . . ." "Really, Mr. Bethell!" interrupted the shocked and surprised Lord Justice. Westbury would never tolerate any judge or counsel who failed to grasp a classical allusion or misunderstood a quotation ; and his treatment of Rolt, who, though an able lawyer, was no classic, was resented by the Bar. He cannot have been altogether innocent of an intention to jest when making some of his remarks, as in his famous injunction to his coachman when the horses ran away : "Drive into something cheap." He did not easily assimilate the tone of the House of Lords, and before he gained ascendancy there his earlier speeches were resented as being too ungracious and of too great levity for that assembly.

But when all criticism has been said, there can be no doubt that Lord Westbury was a man of almost incredible power and achievement. Without influence, aided only

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by his natural gifts, he rose to the highest position. He achieved great reforms in the administration of justice and inspired others, realizing as he did that reform was now the function of Parliament, and could only be achieved by the co-operation of both sides of the House. He elucidated legal principles with a mastery of exposition which few have equalled and none excelled. If he offended many, at least he bowed the knee to none ; and when he died, a notable figure disappeared, regretted and missed, if not very generally mourned.

He had his own philosophy of life. It was very disputable ; it was somewhat easy. But the old man believed in it ; and pursued it with great composure, and no small degree of enjoyment, to the end.

And when all is said and done, he was a very great Lord Chancellor.



## EARL CAIRNS

OF the men who rose to fame by way of the law, Cairns is one of the best examples of those who won by merit alone. Unbacked by influence, unable by reason of his weak health and serious nature to gain friends by social arts, intensely religious, terribly in earnest, devoid of humour, he succeeded in virtue of dogged ability, sheer intellectual force, and the confidence he inspired by his unchallenged integrity.

As a youth he made his mark by his skill in classics; as a young barrister he won his start by his devotion to his occupation and went rapidly ahead by reason of his pre-eminent ability. Sincere and without guile, he won the respect of the judges, the lawyers, and the public. In politics, absolute sincerity, consistent earnestness, and sound judgment brought him to the front, and for years he exercised a profound influence on the counsels of the nation. As a judge, his decisions were welcomed as luminous and accurate expositions of legal principle, and, as a law reformer, his efforts at improving the law without party proclivities led to the enactment of many useful, if not spectacular, Statutes, the benefits of which are still enjoyed by many who are unaware to whom they owe them. So powerful was his influence that for years, whether in office or in opposition, no measure of legal reform could become law without his approval. Had his health been more robust, had he had a genius for friendship or the leadership of men, Cairns would have been one of the great men of the world. To him came, almost unsought, the leadership of a great party, but his constitution proved unequal to the strain. If the Conservative Party had had



THE RT. HON HUGH McCALMONT, EARL CAIRNS  
LORD HIGH CHANCELLOR

Engraved by D J. Pound from a photograph by Mayall.



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the continuous guidance of one who was a quintessential Conservative, the course of history might easily have been completely changed. Speculation is unprofitable, and it is wiser to consider the man and his work.

His family had been settled in Kirkcudbright when, under James I, many Scots were encouraged to make their homes in Ulster. Among them was Cairns' ancestor. The family prospered, but not unduly. Many of them served the King in the Army and Navy, the most notable being Alexander Cairns, who won a baronetcy while serving under Marlborough in the French wars. The future Lord Chancellor was the second son of William Cairns of Cultra, County Down, a former captain in the 47th Foot. The child, who was christened Hugh McCalmont, showed marked signs of ability at an unusually early age. Though self-possessed and self-contained, he was not priggish, nor pedantic; but there is something highly abnormal about a boy who was able to lecture publicly on chemistry at the age of eight, and to write articles which were accepted for publication when he was no more than eleven. His education followed a natural course for a middle-class Protestant in Ireland. He went first to Belfast Academy and thence to Trinity College, Dublin. He graduated with a first in classics in 1838, but failed to gain a Fellowship, because, as is not unusual with born classics, he was not conspicuous for mathematical ability.

Up to the time of his University career he had been destined for the church, and, for a young man of his earnest religious feeling, such a career would have seemed eminently natural. But the law gained what the church lost. His tutor, though a clergyman, conceiving that Cairns' intellect was more suited to forensic life, advised the Irish Bar, and his advice was followed.

Then, and for years afterwards, a candidate for the Irish Bar had to enter at one of the four Inns of Court in

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London and eat dinners there. Accordingly, in January, 1844, Cairns came to London and entered as a student at the Middle Temple, though he soon migrated to Lincoln's Inn. He became a pupil of Thomas Chitty, the celebrated pleader, and, after mastering the principles of the intricate system of pleading then in force, went to the chambers of Mr. Malins (afterwards a judge) to study real property and conveyancing. Malins was so struck by his pupil's ability that he urged Cairns to abandon the idea of practising in Ireland and to be called in England. It is a curious circumstance that Thesiger (Lord Chelmsford), whom he afterwards supplanted on the Woolsack, entered Gray's Inn as a student with a view to practising in the West Indies, and was similarly persuaded to try his fortune in England. When Cairns was called he set himself to practise with all his solemn earnestness. No reason or excuse did he allow himself to leave the precincts of the law while a barrister might be expected to remain there. It was this circumstance that gave him an early start. He had declined an invitation for a Saturday, though he had no work to do, and was sitting in his chambers close on four in the afternoon, when the unexpected happened. An eminent solicitor, Mr. Gregory, of Bedford Row, had a sudden occasion to consult counsel. He tried many chambers, only to find them closed. At last, he came to the address where Cairns was keeping his lonely vigil and found, not merely a barrister, but the barrister for whom solicitors are always looking—a young man of ripe learning and sound judgment. From that day Mr. Gregory's firm were constant clients. He had not too much confidence in his own ability as an advocate; indeed, he considered that he was suited only for work in chambers, but solicitors soon found that Cairns as an exponent of equity had few peers, and he rapidly built up a commanding practice in the Court of Chancery. It was not long before his abilities were acknowledged. Lord Westbury, when a

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silk, met Cairns in consultation, and, though never liberal in commendation, was moved to prophesy. "That young man," he said, "will undoubtedly rise to the top of his profession." But, with all his success, he made and adhered to a rigid rule never to work on Sundays, though how a busy advocate can avoid such work it is difficult to understand.

It was natural that an Ulster Protestant who was making his mark at the Bar would soon take to politics. In 1852 Cairns was elected as Member for Belfast, which consistently returned him until he was raised to the Bench. The Government was the notable Administration called the Ministry of All The Talents, and the prospects of a new Member in opposition seemed none too bright. He soon became a force. The Budget of 1853 extended the principle of legacy duty to realty, and in the debates where Westbury first won distinction Cairns also shone. He paid, at first, most attention to legal matters, and contributed weighty criticisms on Bills relating to merchant shipping, partnership, limited liability, and similar topics. By the end of that Parliament he was sure of promotion. By 1856 he felt justified in taking silk, and, as a Q.C., he elected to practise before Vice-Chancellor Wood.

During the short-lived Conservative Ministry of 1858-59 he was Solicitor General, and justified the confidence placed in him. As a natural result of his promotion, his practice widened, and he was often retained in Scotch and Irish appeals and in ecclesiastical causes. It was a time of great religious controversy, and many lawsuits followed. It is no part of my purpose to describe those celebrated proceedings, but there were few in which Sir Hugh Cairns was not concerned. In the Privy Council, too, he was frequently engaged to lead in colonial appeals. Such a volume of work, added to the strain of Parliamentary life, in which he took a most active part, tried severely a constitution which was never robust.

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But he never shirked his work and did whatever he was called upon to undertake with earnest sincerity. Lord Chelmsford had not fulfilled expectations as Lord Chancellor, and many thought that Cairns would replace him, since he, at least, could be relied upon both in politics and in law. He took an outstanding part in the Reform debates, and on Cardwell's motion of censure on Lord Ellenborough's conduct as Governor-General in India. Other noteworthy speeches in Parliament were on the French Commercial Treaty in 1860, an arrangement which seemed then to herald an extension of Free Trade to other countries; and on the questions which arose out of the ships fitted out in England for the Confederates during the American Civil War. In office and in opposition, he had borne his share of controversy, and, when the Derby-Disraeli Government of 1866 came into office, he became Attorney General. He soon came to the decision that his health could not stand the double strain, and he "called for" a vacant Lord Justiceship. His colleagues were loath to lose him, but recognized the cogency of facts, and accordingly he left Parliament for the Bench. He was offered a peerage but declined for want of means. A wealthy relative soon removed this obstacle, and in February, 1867, he was raised to the peerage as Lord Cairns and sworn of the Privy Council. In February, 1868, Disraeli became Prime Minister, and at once replaced Chelmsford by Cairns. It was believed that Chelmsford was not unwilling, and, as has happened on occasion, that belief led to a disregard of his feelings. It is not necessary to repeat the incident which led Lord Chelmsford to complain that he had been dismissed with less courtesy than if he had been a butler. There can be no doubt that the State gained immensely by the change. Cairns took a noble revenge by appointing Lord Chelmsford's son to be a Lord Justice at an extremely early age. The appointment was justified by Lord Justice Thesiger's ability, but he did not live long enough to con-

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firm his reputation, dying prematurely as a result of water entering his ear while bathing. By December, 1868, the Government was out and Cairns was in opposition. He was offered his old place as Lord Justice, but declined. In 1869, on Lord Derby's death, he became leader of the Opposition in the House of Lords. The most noteworthy event was the passing of the Irish Church Bill, which was only rendered possible by a compromise negotiated by Cairns. He was too good a Constitutional lawyer to press opposition too far against a majority in a newly-elected House of Commons in regard to a measure that had been an issue at the election. The supporters of the Government were as dissatisfied with the compromise as were the Opposition, which is at least some reason for thinking it fair and reasonable. However that may be, Cairns resigned the leadership in consequence, but, in 1870, was again induced to assume that task. In that year he contributed to the debates on Belgian neutrality which Prussia then feared would be violated by France. His health broke down again, and this fact induced him to fix his principal residence at Bournemouth, but he was often in his place in the Lords. He took a prominent part in the debates which arose on the appointment of Sir Robert Collier (Lord Monkswell) to the Privy Council, an episode which brought Gladstone much odium. There was a vacancy on the Judicial Committee, and Gladstone desired to appoint Collier. He was, admittedly, a distinguished lawyer and on his personal merits in every way fitted to hold the office. But the Statute required the appointee to have held high judicial office, and Collier did not happen to possess this qualification. In order to render him eligible he was made a Judge of the Court of Common Pleas, and a few days later was appointed to the Privy Council. It was this pretence—for he never seriously intended to sit in the Common Pleas—that aroused such a storm. The words of the Statute were indeed complied with, but the



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spirit and intention of the provision were as clearly violated. No one wished to dispossess Collier, but naturally it was feared that such an evasion might open the door to other less distinguished and upright men.

In 1873 Lord Selborne introduced and carried the Judicature Bill, which is the foundation of our present judicial system. By this time Cairns had attained such influence that no measure of legal reform could be carried without his concurrence. He was never factious in such matters, and it is the example set by him that is now followed whenever alterations of law which have no political aspect are proposed. The project is considered on its merits and the lawyers on both sides co-operate with a view to producing an agreed measure which is calculated to achieve the desired result. Such was the case with the Law of Property Act, 1922, which I introduced in the House of Lords.

When the Judicature Act, 1873, came into operation in 1875 Cairns was the first Lord Chancellor under the new system. He had, however, by the Appellate Jurisdiction Act, preserved the jurisdiction of the House of Lords which the earlier Act intended to abolish. The election of 1874, which again brought Cairns to the Woolsack, is another example of his wisdom and influence. When Gladstone announced the dissolution, general opinion gave him a sweeping majority. Disraeli, on hearing the news, was dismayed. He exclaimed, "Send for Cairns at once." Cairns came and convinced his leader that a victory could and would be won. He proved to be right, though politicians doubted until the returns came in. In this and subsequent Parliaments Cairns devoted much time and thought to various legal reforms. His Vendors and Purchasers Act, 1874, enabled disputes as to land purchases to be settled cheaply and expeditiously. The Land Transfer Act, 1875, recast Lord Westbury's measure, but still on a voluntary basis. After he left office he

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continued his efforts and did much to frame the Married Women's Property Acts, the Conveyancing Acts, and the Settled Land Acts, and similar measures. Cairns had been raised to the dignity of an earldom in 1878 and shared Lord Beaconsfield's defeat in 1880. Though he lived till 1885 he never held office again. When Beaconsfield died in 1881 many desired him to succeed to the leadership. But his health was deteriorating, he was beginning to be deaf, and he gradually failed. At last he died on 2nd April, 1885, on the eve of the Home Rule controversy. He had a large family of five sons and two daughters.

It would be easy to dismiss Cairns' claims to be a great advocate on the ground that, in his sphere, accuracy, lucidity, and learning are the only essentials, and eloquence in Chancery has been said to be "an insult to the Court." But others who did not rise to his eminence have often possessed all those faculties. The combination of exact statement, logical precision, lucid exposition, and grasp of principle united in a man of tremendous determination and intense sincerity must have had an effect transcending the mere words used. He was so easy to follow. His argument made clear, as he went along, how his mind was working, and the few cases that he cited served their purpose to make lucid and not to obscure the point he was making. He never over-elaborated his argument and was averse to displays of learning beyond the imperative requirements of the occasion. Naturally, he was rarely engaged in *causes célèbres*. The scandals of the day made the reputation of other advocates practising in jury cases. Nevertheless, on the rare occasions when he was called upon to conduct cases before a jury he showed that he had in him a capacity to capture and hold the mind of laymen. It may be that plain men were getting tired of the fustian which had by then replaced the eloquence of the Erskines of an earlier day. In 1861 he was counsel in the great Windham lunacy case. It was tried by the Master in

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Lunacy (Samuel Warren, the author of *Ten Thousand a Year*) and a jury, and lasted thirty-four days. Among other results of that inquiry, it strengthened Lord Westbury's hands in proposing reforms in the lunacy laws. At a later date he appeared before judge and jury in the Exchequer in a case arising out of the detention of the *Alexandra*, a vessel destined for the Confederates. Though he soon gained, and always retained, the respect of his colleagues at the Bar, yet so cold, austere, and reserved a man never won their affection. Indeed, though the Bar is given to anecdote and quick to note any idiosyncrasy, there is no tradition as to Cairns. The solitary piece of gossip that I have heard is that he had a peculiar weakness for always wearing clean bands—which rather throws a light upon the habits of his contemporaries than on the man himself.

Most of his judicial work was done with others. As Lord Justice of Appeal in Chancery (not to be confused with the present Lords Justice) he rarely sat alone, and, as Lord Chancellor, he was not often called on to act as a judge of first instance. He was, indeed, the Lord Chancellor who, in 1875, inaugurated the present judicial system under which the Lord Chancellor rarely visits the Law Courts save at the opening of the judicial year on 12th October, and more rarely on other State occasions. There are exceptions, notably Lord Halsbury, who, to relieve congestion, sometimes presided over a third Court of Appeal, and I may mention that I sat for a considerable period as a judge in divorce in order to overtake arrears in that Division.

It is only by perusing the reports of Cairns' decisions as a Lord Justice that the full extent of the part that he played in developing the law of companies, as we know it, can be appreciated. The modern limited company owes its origin, after the preliminary statutory experiments, to the Companies Act, 1862. When Cairns came to occupy

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the seat of justice there had been time to realize that this new system gave rise to many dangers and that the law required adaptation to cope with many novel situations. To a very great extent the cases in which he expounded the principle of company law have been superseded by later Statutes. It is no part of my purpose to write a history of law, and, therefore, I omit these cases, merely emphasizing the fact that he was one of the most active of the judges who expounded and applied the principles of company law. It was in a case upon the Companies Clauses Act, 1845, which still applies to statutory companies, that he uttered the phrase "a fruit-bearing tree" to describe the undertaking of a company.

Of the other cases that he decided as Lord Justice I will mention six only—five in 1867 and one in 1868.

*Maxwell v. Hogg*, (L.R. 2 Ch. 307), decided that there was no copyright in a mere word. In 1863 the defendant had registered a new magazine to be called the *Belgravia*. It never appeared, but in 1866 the plaintiff, not knowing of the registration, spent much money in projecting and advertising a new magazine to bear the same name. The defendant thereupon rushed out his magazine. Cairns held that mere advertisement or expenditure gave Maxwell no right to the name; there was at the relevant date no magazine of his that bore the name. On the other hand, Hogg was asserting copyright in a single word, and, consequently, both failed. To protect a name such as the one in question, there must be an existing concern which has gained a title to protection.

In *Schotsman v. Lancs. and Yorks. Railway*, (L.R. 2 Ch. 332), Cairns expressed the view that proceedings in equity would lie to enforce a seller's right of stoppage *in transitu*.

*re Agra and Masterman's Bank*, (L.R. 2 Ch. 391), decided a point on letters of credit. The bank had given to A an open letter of credit. He drew bills for £6,000

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and endorsed them to the appellant, who endorsed the letter of credit accordingly. The bank was ordered to be wound up, and in the liquidation it was found that A was indebted to it for an amount exceeding the letter of credit. Cairns pointed out that a letter of credit was a contract for the benefit of all who should take or pay for bills on the strength of it, and, accordingly, the appellant's right could not be affected by the state of accounts between A and the bank, of which he knew nothing.

*Hopkinson v. Lord Burghley*, (L.R. 2 Ch. 447), raised a point of practice. It had long been decided that the receiver of letters could not publish them against the will of the sender. In this case, the defendant had received certain letters which related to the issue, and on the established principle he had to disclose them to the other side and allow inspection. But in this case the letters had been marked "confidential," and the sender had forbidden the defendant to show them, and, accordingly, the defendant refused to produce them. Cairns made short work of the objection. "The writer," he said, "is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such lawful purpose. But, if there is a lawful purpose for which a letter can be used, it is the production of it in a Court of Justice for the furtherance of the ends of justice." But he put the plaintiff on an undertaking not to use the letters or any copies of them for any other purpose.

*United States v. Wagner*, (L.R. 2 Ch. 582), was an action which arose out of the American Civil War. The defendant objected that the plaintiff, being a republic, could not sue except by some responsible officer, such as the President. Cairns overruled the objection. He pointed out that the analogy with a foreign sovereign failed. The plaintiff was a foreign State recognized by this country and must be entitled to act as such.

*Berndtsons v. Strang*, (L.R. 3 Ch. 58), was a claim not

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only to timber under the right of stoppage *in transitu*, but also to the benefit of money due for damage to the timber under a policy of insurance taken out by the purchaser. Cairns held that the seller could not claim the money. He said, at p. 591, "The right to stop *in transitu* is a right to stop the goods in whatever state they arrive. If they arrive injured and damaged in bulk or quality, the right to stop *in transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of the goods."

From 1868 till his death, Cairns was a member of the House of Lords and sat to hear appeals. When Lord Chancellor in 1868-9 and 1874-1880, he was assiduous in the discharge of his judicial functions. At other times he sat less frequently. The labours of an ex-Lord Chancellor are rendered gratuitously, and he no doubt considered that, in his weak state of health, he was entitled to recruit his waning strength. After 1880 his health continued to fail and his hearing became affected, so that it was unreasonable to call upon him. Nevertheless, he did sit on occasions. The last reported case which I have found where he sat was *Bowen v. Lewis*, (1884, 9 A.C. 890). It was a difficult case on the construction of a will, and had once before been argued before three Law Lords. On the second argument Cairns was called in. The ultimate decision was that of a majority of three to two. The case is not of great interest and is chiefly noteworthy that in this last judgment he eulogized the rule in *Shelley's Case* as a non-technical rule of law. On 1st January, 1926, this venerable rule will have ceased to exist.

An extremely large proportion of Cairns' judgments in the Lords forms part of the working tools of a practising lawyer. It is a temptation to deal with them all and thereby

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to expand this article to an unconscionable length. I have selected only a certain number for mention, limiting myself to those which are important for the due appreciation of Cairns' methods and powers.

In *Routledge v. Low*, (1868, L.R. 3 H.L. 100), he expounded the policy of the Copyright Acts. At p. 110 he said: "The protection is given to every author who publishes in the United Kingdom, wheresoever that author may be resident or of whatsoever State he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. This benefit is obtained . . . by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country; and, if that stock can be increased by the publication for the first time here of a new and valuable work by an alien who has never been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object in the Act and in its wide and general provisions which should entitle such a person to the protection of the Act in return and compensation for the addition he has made to the literature of the country."

There is no trace of any idea that other interests are involved save that of the author and the reading public; no notion, for example, that those engaged in the mechanical production of books have any title to be considered, nor does the statement show any appreciation of the difficulties which encumber the question of international copyright. It is only fair to add that judicial pronouncements rarely go beyond the immediate requirements of the issue. The

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last sentence is a prodigious one, and, though its meaning is clear, it might be difficult to justify against a pedant a sentence which never in terms of grammar says what is not prevented.

*Rylands v. Fletcher*, (1868, 3 H.L. 330), is one of the best known cases in English law. A landowner was minded to make a reservoir. He employed a competent contractor and the work was done in a manner seemingly adequate. In fact, there were on the land submerged disused mine shafts which were not so sufficiently closed up and sealed as to prevent water passing down them. The consequence was that the water in the reservoir passed down the shafts into some disused workings and thence came into and flooded a neighbour's mine. The House of Lords laid down the rule that if a person brings on to his land something which, unless kept on the land, will do damage to neighbouring land, he does so at his peril and must answer for the consequences of any escape. This rule, amplified and qualified by later decisions, is in constant operation, though it would, perhaps, have surprised those judges who formulated the principle to learn that it applied to some of the later cases where it has been invoked with success.

*Hammersmith Railway Company v. Brand*, (1869, 4 H.L. 171), is an extremely important case upon the construction of Statutes conferring statutory powers. The appellant company was empowered by Act of Parliament to construct and work a railway. The exact terms of the Statute were, of course, important. For the present purpose it is sufficient to say that the line of the railway was prescribed and it ran near the property of the respondent. After the railway had commenced to run trains, it became apparent that the vibration of passing trains was causing damage to the respondent's houses. He accordingly brought an action for an injunction, as the Act was silent on the question of damage by vibration. It was held that an injunction could not be granted. Lord Cairns summed



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up the legal position thus: "It appears to me that the effect of the legislation on this subject is to take away any right of action on the part of the landowner against the railway company for damage that the landowner has sustained. It must be taken . . . that the railway could not be used . . . without vibration. It is clear to demonstration that the intention of Parliament was that the railway should be used. If, therefore, it could not be used without vibration, and if vibration necessarily causes damage to the adjacent landowner, and if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable . . . for the damage . . . and the Court of Chancery would interfere by injunction, and would prevent the railway being worked, which would defeat the intention of the Legislature." It is a clear and convincing *reductio ad absurdum*. These passages also illustrate the sparing use of adjectives which is characteristic of Cairns' judicial utterances. There are only two, both unavoidable, "railway" in the phrase "railway company" and "adjacent" to qualify "landowner." The only adverb is "necessarily" which is equally unavoidable. Cairns marshalled his facts with scrupulous care and allowed the process of logic full play without the assistance of adjectives and adverbs for purposes of effect, or, as some judges have done, to conceal the fact that the conclusion is predetermined.

The year 1874 was marked by a large number of important decisions in the House of Lords. Of these I will mention only two.

*Ashbury Railway Carriage Company v. Riche*, (L.R. 7 H.L. 653). The question was whether a company formed under the Companies Act, 1862, was bound by a contract of a kind not authorized by its Memorandum of Association. There was a subsidiary issue whether the shareholders had ratified the contract, and, if so, whether such ratification would render the contract binding upon the company.

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At common law a corporation could enter into any contract, but these companies, formed not by charter or by special Act but by registration under a general Statute, were of recent origin, and the point now arose whether they were on the same footing as common law corporations. Lord Cairns explained and discussed the sections of the Act and the Memorandum and Articles, and came to the conclusion that the contract was one outside the objects mentioned in the Memorandum, and then summed up the matter in these words:—"It is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal. The question is not as to the legality of the contract; the question is as to the competency and the power of the company to make the contract. Now I am clearly of opinion that this contract was beyond the objects in the Memorandum of Association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing of the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

"But, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made? It appears to me that

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it would be perfectly fatal to the whole scheme of legislation if you were to hold that, in the first place, directors might do that which even the whole company could not do, and that then the shareholders, finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized."

The principle thus established has been consistently followed since. Though in certain respects and following a prescribed procedure, a company may now alter its Memorandum, yet if a contract be entered into which is outside the powers set out in the Memorandum it is void.

*Dawkins v. Lord Rokeby*, (L.R. 7 H.L. 744), was one of those painful cases which occur when the career of an officer is affected by an adverse report. Dawkins was a Lieutenant-Colonel in the Coldstream Guards. Lord Rokeby was in command of the Guards Brigade. On 3rd February, 1865, the Duke of Cambridge directed a court of inquiry to be held as to the truth of charges made by Colonel Dawkins that various officers under whom he had served had made false statements of fact to his injury. The court was invited to express its opinion also upon Colonel Dawkins' conduct generally and to state how far the service would be benefited or not by placing him in command of a battalion of Guards. At the court of inquiry, Lord Rokeby attended and gave evidence. At the close of his evidence, without any request, he handed in a written paper. Dawkins applied for a court martial on Lord Rokeby for his conduct in making the representations in the paper, and on this being refused brought an action for defamation, based on the evidence given and on the paper. The evidence and the document both related to the subject matter of the inquiry. At the trial, Mr. Justice Blackburn excluded evidence alleged to show that Lord Rokeby had made these statements *mala fide* and with malice, knowing them to be false. He held that statements made by a

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witness in the course of a military inquiry with reference to the subject matter of that inquiry were absolutely privileged, and, consequently, that Dawkins had no right of action. The case reached the Lords and the ruling of the judge was upheld. It was admitted by the appellant that a witness in an action was protected, but he claimed that a court of inquiry was a mere investigating committee, having none of the requisites of a court. The judges were summoned to assist the House of Lords with their views. Lord Cairns' judgment is very short. After stating the facts very briefly, he continued: "An argument was addressed to your Lordships to show that the inquiry in question was not to be considered in the light of a judicial inquiry, and the evidence was not evidence given by a witness on oath. That is quite true, but at the same time . . . it was an inquiry connected with the discipline of the army; it was an inquiry warranted by the Queen's regulations . . . it was called for by the General Commanding-in-Chief in pursuance of those regulations, and the defendant in the action was called upon that inquiry as a witness, as a person who was required to make statements relevant to the inquiry which was then being conducted, and it was in the course of that inquiry that those statements were made. . . . I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made . . . were relative to that inquiry. . . . Statements made under these particular circumstances are statements which cannot become the foundation of an action at law."

This principle has been uniformly acted upon since

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then. There have been occasions when its application may have operated harshly. So, too, when a witness in court gives evidence damaging to another's character. It is hard that such statements cannot be challenged by an action, but there is a paramount consideration that the ends of justice would be defeated if witnesses were liable to be sued by any person whom they may mention in terms which he dislikes. To give evidence with such a risk attaching would be an ordeal from which all but the bravest or most vindictive would shrink.

*Goodwin v. Roberts*, (1876, 1 A.C. 476), is a decision which proved that the custom of merchants can still operate so as to widen the application of law. It was there held that the holder of foreign Government scrip had shown that it was a negotiable security, and in the words of Lord Cairns, "Any person taking it in good faith obtained a title to it independent of the title of the person from whom he took it." Since then, in *Edelstein v. Schuler*, it has been held that the court will, in a proper case, take judicial notice that commercial documents have acquired the character of negotiability.

*Cundy v. Lindsay*, (1877, 3 A.C. 459), laid down an important rule with regard to the passing of ownership in goods. Lindsay and Co. were manufacturers in Ireland, and received an order, as they thought, from a well-known firm in Wood Street, London. They sent the goods. The firm in question was not the one they believed it to be, and the address was at a different number. An astute individual having a name similar to that of the Wood Street firm had taken an office with windows overlooking Wood Street, and had used a number in that street, counting upon obtaining goods by credit from people who were, as they thought, dealing with the other firm. The goods in question he sold for cash to Cundy, and the question was, whose property were they?—for it was certain that whoever did not own them must lose his

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money. The House of Lords held that the ownership was still in Lindsays and that, therefore, Cundy must give them up. As Lord Cairns forcibly put it, "Of him," (i.e., the trickster), "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. The pretence of a contract is a failure." The case is an authority upon the formation of a contract and also upon the transfer of ownership of goods. If the Irish firm had known they were dealing with the individual in question, but were deceived as to his standing or any matter connected with him, the transaction would have been upheld. It was because there was no intention at all of dealing with the man in question, but with the other firm, that the decision went the way it did.

Cairns' judgments show little sign of human failings. They do not throw light upon him, except his single-minded desire to do justice according to law and his great ability in reducing chaos to order, and in applying legal principles to the facts. He stated the circumstances and the principles with supreme impartiality and accuracy and a wonderful economy of language. Cases he cited but rarely. In many of his most noteworthy judgments he mentioned none at all, but when he did cite them he handled them as a master.

Such was Cairns—a man to whom such great lawyers as Jessel and Benjamin awarded the title of the greatest lawyer of their time, of whom Disraeli said that he was "great in council." When he died, Lord Salisbury pronounced him to be "equally great as lawyer, statesman, and legislator," and his legal rival and political opponent, Lord Selborne, added that even that enumeration "fell short of the truth. He was also a great orator and a man exemplary in private life. It would be difficult to name

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any Chancellor, except Lord Hardwicke, who was certainly his superior or, indeed, in all respects his equal."

This was a high tribute, but if I had been afforded (in point of all our ages) the opportunity I should certainly have invited him to a dinner-party at which the other guests would have been Chief Justice Cockburn, Lord Selborne, Sir Samuel Evans, Lord Westbury, and Jessel, M.R. In such a company we might, I think, have had what even Dr. Johnson would have considered good talk.



SIR JAMES FITZJAMES STEPHEN, K.C.S.I.  
JUDGE OF THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

*Photo: London Stereoscopic Co.*





## SIR JAMES FITZJAMES STEPHEN

**I**N the course of centuries, many ways have led men to high judicial rank. Generally, the successful advocate has had the better prospect, especially if he has shown an aptitude for politics. Learning has been represented by many judges whose forensic career, by itself, would not have justified selection. Stephen owed his position to his skill as a draftsman and to a logical and powerful brain.

The era of legislation which followed the settlement of Europe after the Napoleonic wars, naturally gave rise to a desire to arrange and reduce statute law to a reasonable bulk in intelligible form, and the increased skill in drafting statutes relating to private rights as naturally led to a desire to express in the precise language of legislation the rules of private law which had been garnered by judicial pronouncements from the customs and usages of the people.

The reign of Queen Victoria seemed destined to be known to the law as the era of codification. By the exertions of legislators and lawyers much was done to clarify and restate the rules of law, but though the statute book was purged of obsolete laws and many consolidation Acts have lightened the task of lawyers, the movement has perhaps nearly ceased. Men came to doubt whether the process of gradual adaptation to changing conditions would not in some respects be hampered if rules not yet fully worked out were prematurely stated in an authoritative form, and England, which was not the pioneer of codification, seems now content with a convenient if a somewhat unscientific statement of legal principles, presenting in this respect a marked contrast with many other countries. But it is consoling to think that, important though the form

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of the law may be, the administration of justice is even more important, and in that regard (in spite of Dayton) we can truly claim to lead the world.

Among the many who were engaged in the work of codification, Stephen stands out as a lucid and arresting figure. He had a genius for that difficult and delicate operation which seems to the unthinking to be so easy, but as he himself pointed out : " Acts of Parliament . . . though they may be easy to understand, people continually try to misunderstand . . . It is not enough to attain to a degree of precision which a person reading in good faith can understand ; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand." It is easy indeed to express a meaning sufficient for a particular occasion, but, as anyone who has had experience in drafting statutes can testify, it is inconceivably difficult to frame an enactment which is simple and direct, but capable of application to the many changing conditions which it is intended to govern. Such was Stephen's skill that, though his progress as an advocate was slow and he attained no outstanding position in the Courts, his merits were rewarded by a judgeship. Until the end when his faculties were affected by illness, he very adequately and by sheer intellectual power justified the confidence which secured his promotion.

He came of a family which has produced an unusual number of eminent men. Both on the maternal and paternal sides one can name those whose reputation rests upon a sure foundation. His origin is traced back to a James Stephen born in Aberdeenshire in 1733. This James was a man of exceptional strength, a characteristic which he transmitted to his descendants. On one occasion as a young man he was waylaid by two footpads. It was a sorry experience for them. He seized them, knocked their heads together, and left them lying unconscious on the ground. In 1752 he was a supercargo on a ship which was

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wrecked near Portland. He was rescued and taken to the house of Mr. Milner, the Collector of Customs at Poole. His host's beautiful daughter captured his heart and he remained in conjugal chains in those parts. Though a man of ability, he was not commercially successful. At one time he was imprisoned for debt. During his incarceration he meditated upon the law which so strangely punished a debtor by preventing him from working, and thus rendered permanent a load of debt which work alone might remove. He conceived that imprisonment for debt was contrary to Magna Carta and therefore illegal. His theme convinced his fellow-prisoners, and he was encouraged thereby to argue the point before Lord Mansfield, but naturally without success. Nothing daunted he published his reasons as a pamphlet, and, on obtaining release by his creditor's aid, determined to follow the law.

He entered the Middle Temple but the benchers refused to call one notoriously in difficulties, and his desire to practise was only gratified by his being covered by a solicitor whose work he did in name, but really on his own account. Eventually he died in straitened circumstances. He had a brother who had succeeded in the West Indies and befriended his sons. Thus it was that, the second James Stephen, born in 1758, was enabled to study at Aberdeen. He obtained work on the *Morning Post* (not yet hysterical) but was destined for the law. He began practice in the West Indies, where owing to the wars he gained much profit from prize cases. In 1794 he returned to England and was heavily engaged in the more lucrative prize work in this country. By his writings he supported the Orders in Council which were our counterblast to Napoleon's Berlin and Milan Decrees. His reward, oddly enough, was a Mastership in Chancery, in 1811, for which his previous experience did not qualify him, but he soon acquired the necessary knowledge and experience and acquitted himself to the satisfaction of

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suitors. His practical acquaintance with slavery in the West Indies had made him a determined emancipationist, and his religious and social opinions led him to become a prominent member of the Clapham group. Whether he gained or lost, who knows?

James, the Master in Chancery, had a son, the third James, born in 1789. He was educated at Trinity Hall, Cambridge, and was called at Lincoln's Inn in 1811. His career was distinguished by his administrative work. In 1825 he became counsel to the Colonial Office and to the Board of Trade. He had previously shewn his skill as a draftsman in connection with a proposed digest of colonial laws, and by preparing the Slavery Act of 1824. Gradually he became absorbed in the work of the Colonial Office. In 1834 he was made Assistant Under Secretary and in 1836 became Under Secretary, resigning his position as counsel to the Board of Trade. He was a hard working, efficient and exacting Secretary, whose subordinates nicknamed him "King Stephen." When a glutton for work sits in the seat of authority, life, as Lord Curzon knew, is apt to be strenuous for subordinates; and he was not popular. Like his more famous sons, he was shy and inclined to be a recluse; but his shyness, as so often happens, led him on occasion to be loquacious. His great recreation, as that of Gladstone, was walking, and this dismal liking he transmitted to his children. After a time his work caused a breakdown, and he resigned office in 1847, being almost immediately appointed Regius Professor of Modern History at Cambridge. It was a fine record.

The third James was the father of Mr. Justice Stephen (and one may be permitted to add of Sir Leslie Stephen). The future judge was named James Fitzjames, the latter name being added to overcome his father's objection to "James." He was born on 3rd March, 1829, in London. As a child he shewed himself capable of that independence of thought and action which is commonly, by one's elders,

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confused with obstinacy. He had a retentive memory and could recall his mother saying that the Reform Bill had passed. This was in 1832, when he was accustomed to recite to his admiring family, and his sayings began to be treasured. At this early age, he had made the momentous declaration, "I don't want to be as good and wise as Tom Macaulay," an opinion which many others have since shared. In 1836 he went to a preparatory school. He wanted to go to Rugby, but was sent to Eton instead in 1842. The experience was a bitter one which he never forgot. He was not intended by nature for the school life of those days.

After three years his father allowed him to leave and he marked the event by solemnly tearing off his white tie and stamping on it. For the next two years he was at King's College, London, where, though the curriculum was of the strict form then in vogue in London University, his life was freer. His genius was not suited to steady plodding. Like many another of great ability, he did his best when left to follow his own bent, but intensive reading of such parts of the work as interest the student, to the neglect of the less interesting, is apt to result in uneven learning. Though he did well at King's College, and made his mark as a debater, his impatience of drudgery debarred him from being a first rate classic or mathematician, and prejudiced his University career. In 1847 he matriculated at Trinity College, Cambridge, and soon made his mark as an undergraduate, though he never achieved the pre-eminence afterwards conceded to his brilliant son, "J. K. S." His exploits at the Union, where his chief antagonist was Harcourt, quickly brought him fame. The vigour and character of his speeches earned him the nickname of the "British Lion." His friendship with Maine brought him into the remarkable society known as "The Apostles," of which Tennyson, Hallam, Maurice, Charles Buller, Tom Taylor, Merivale, Harcourt and many

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other prominent men were at various times members. His reading proceeded on his own lines ; and was not interrupted by the pursuit of athletics. The promise of a "blue," made to him more than once, moved him not at all. He was a great walker, but athletics did not interest him. Once at Liverpool Assizes he astonished the bystanders by asking (and it may be added with perfect honesty) "What is the Grand National ?" But though he moved, as the phrase goes, in the best intellectual circles of Cambridge his prowess as an examinee was not remarkable. Twice he was beaten for a scholarship at Trinity. This made the prospect of a fellowship impossible. He took stock of the position, and after consulting his father, decided to abandon the *Tripes re infecta*. He went to the Continent and at Paris frequented the Law Courts to learn the procedure adopted there. He was carefully considering the question of a career and finally decided on the Bar. But he completed his Cambridge course by taking a poll degree. When he began law he threw himself into the work with immense energy, and as one step he sat for the London L.L.B. where he was placed in the First Class, and awarded the University Law Scholarship.

At this stage of his life it is not uninteresting to review his achievement. Throughout he was recognized as a student of first rate ability, but at Eton and at Cambridge his academic career was not notable, while at King's College, London, and in the London degree examination he distinguished himself. It was obvious that given an object to be achieved, and left to himself to achieve it, he could and would succeed, but he was not one who took kindly to routine or drudgery. He had now to learn to accommodate his genius to work in the world, and to acquire the habit of doing thoroughly such tasks as came to him, whether they were congenial or not.

He read in the chambers of Mr. Field, a distinguished lawyer who on retiring from the Bench was raised to the

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peerage. Once his pupilage was over he began to practise, and experienced all the delays which dishearten the beginner. He was called in 1854, and joined the Midland Circuit, but was not a good circuiter. He despised what seemed to him the tomfoolery that lightens, to more congenial minds, the tedium of life in Assize towns, and shewed himself solitary, hard, direct and uncompromising. He was what Americans call a bad "mixer." The Midland Circuit was provincial in sympathy and prejudiced in influence ; it was almost impossible to make headway against the secure position of the men who held the work. His first brief was at the Old Bailey. Progress was slow, and not until 1859 did he make £100 at the Bar in a year. By 1861 he became a revising barrister, had been given his red bag, and made £100 on circuit.

Stephen had, however, found another outlet for his energies. He had an imperative need to earn money, having, as is the delightful custom of the Bar, married for love at an early age. On the 19th of April, 1855, he had espoused Mary, daughter of the Rev. J. W. Cunningham, and his professional income could not possibly support them. In that year he began to contribute to the *Saturday Review*, and revealed himself as a writer of vigour and ability. His contributions increased, and with them his reputation. In 1858 he was made Secretary of the Commission on Education, which absorbed much of his time for three years, and convinced the authorities that he was worth encouraging. But this post and his journalism had gained him a reputation which he feared might cause people to think that he was not seriously to be considered as a practitioner, despite the facts that he had become Recorder of Newark in 1859 and that his practice, though small, was increasing. He had in 1857 published an essay on criminal law, and he decided to write a book upon it. In 1863 the book was published under the title of "A General Review of the Criminal Law." It was well timed. Great



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changes had been made in criminal law and procedure ; punishment had been made more humane, and a book written in general terms and in clear and lucid language logically arranged, was bound to succeed. But his work upon this book was early interrupted by his first *cause célèbre*. His great intimacy with Jowett, Dean Stanley, Carlyle and others caused him to be retained in 1861 for Dr. Williams, who was being prosecuted for heresy. He shewed marked ability and succeeded in clearing his client on all but two charges. On the appeal Dr. Williams dispensed with counsel and won on those two charges also. With Lord Westbury presiding the appellant was sure of a smooth hearing.

Stephen's writing had extended to other magazines, and in 1865 the founding of the *Pall Mall Gazette* gave him an opening similar to that afforded to his grandfather when the *Morning Post* was first published in 1781. He accepted commissions to write articles which became more and more numerous as time went on. In 1867 England was excited by the rebellion in Jamaica, and by the accusations of brutality in repressing it alleged against Governor Eyre. A committee was formed, called the "Jamaica Committee," to bring to justice Eyre and his associates. Stephen was retained to apply for process against Eyre, Nelson and Brand, and his argument in the Police Court on Martial Law earned him unstinted praise from his colleagues at the Bar. His growing practice led him to take silk in 1868, and in that year he led in a patent action for Nettlefold and Chamberlain. Mr. Chamberlain attended the consultations and the hearings, and was much struck by Stephen's mastery of the case. He was also retained in the election petitions which followed the General Election of 1868. All this work, legal and journalistic, taxed his great physical strength to the utmost, and in 1869 he accepted the post of Legal Member of the Council in India, just vacated by his friend Sir Henry Sumner Maine.

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In India he did a vast amount of work. The Legal Member was responsible for the drafting of ordinances, and India was a country where legislation could more easily and quickly be passed than in England, where measures must run the gauntlet of Parliamentary procedure. He set to work on codification, and drafted many measures. He was the author, among other measures, of the Code of Criminal Procedure and the Evidence Act of 1872. So great was his output that colleagues in other departments were unable to keep pace with him. But hard work in India was even more wearing than in England; and in April, 1872, he retired, having done more in his 2½ years than most men could do in the usual five.

On his return Stephen resumed practice and journalism, and soon recovered his old position. He again thought to make his return to the Bar known by a new edition of his "General Review," but, finding it convenient to have a work on the law itself to refer to, turned aside to that task which resulted in the publication in 1877 of his "Digest of Criminal Law." This justly celebrated book met with instant success, and remains a classical authority. Its form, which closely resembles a statutory digest, makes it an extremely useful starting-point for discussion. An example of this is shewn by the method pursued by the joint committee appointed in 1914-15 by the Bar Council, the Law Society, the British Medical Association, the Medico-Legal Society, and other learned bodies, to consider Insanity in relation to Crime. The members decided that the best statement of the law was Stephen's version of the Rule in *McNaughton's Case*, and worked upon that. Their labours were used by the British Medical Association to prepare the medical case to be laid before the recent committee on the subject of which Lord Justice Atkin was chairman and on which Stephen's son sat. The Committee's report shows that they, too, recognized the value of his statement of the law. While the book was in preparation

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Stephen was active in other directions. In 1873 he stood for Dundee as a Gladstonian Liberal and was well beaten. He seems to have learned in the contest that he had been mistaken as to his political label. Be that as it may, he resisted all further attempts to bring him into politics.

Disraeli must have read his articles with discernment. When in 1881 he was discussing the question of his successor as leader of the Conservative Party, he observed that Stephen (then a judge) would, if he had been available, have been a good choice. Stephen had never formally left the Liberal Party. He was commissioned to draft various consolidation statutes, a task which seriously interfered with his practice. In 1875 he became Reader in Common Law at the Inns of Court, and held the office until he became a judge. This precedent was followed in 1924 when his successor, Sir Hugh Fraser, was raised to the Bench. As reader he lectured upon Evidence, among other subjects, and took advantage of the opportunity to issue in 1876 a "Digest of the Law of Evidence," a book of small size but of very remarkable authority. Unfortunately its highly concentrated form has caused students to forsake it, because of the difficulty it causes to readers who have no practical acquaintance with advocacy, but to those who know and appreciate our wonderful system of rules of evidence it is an indispensable guide.

I am myself, I believe, a competent authority upon the subject of evidence. I never read a book upon the subject except Stephen's. None but a lucid, logical and powerful mind could have produced it. Stephen also, with the aid of his eldest son, produced a "Digest of Criminal Procedure" as a companion work to the "Digest of Criminal Law." Soon after the latter work was published, it occurred to him that with little alteration it could be made into a statute. He made the suggestion to Sir John Holker, who was then Attorney General, and he caused a Commission to be

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appointed consisting of Lord Blackburn, Mr. Justice Barry (of the Irish High Court), Mr. Justice Lush (father of the Mr. Justice Lush who recently retired) and Stephen himself. This Commission reported on 12th June, 1879, and annexed to the Report a draft Code which has remained a mere project ever since. The demands on Parliamentary time caused it to be shelved for a period, and, though often mentioned as a useful project for legislation, it has never actually been presented to the consideration of Parliament. It is a monument of learning and draftsmanship, and is often consulted when an authoritative discussion on the subject is required.

Stephen's experience led him to be called on for other Commissions, notably those on Fugitive Offenders, 1876, Extradition, 1878, and Copyright, 1878. His services had been rewarded in 1877 by the K.C.S.I., but when he was asked to prepare a codification of the statutes relating to the Government of India, he was obliged to point out that his labours were prejudicing his professional prospects ; he received the promise of a judgeship. He had in 1875 abandoned journalism and before then there had been talk of his becoming Solicitor General and also of his being made a judge, but the talk had not any material result. His briefs were not numerous, though, on returning from India, he had acquired a practice before the Judicial Committee, and, what was a real compliment to a man of his evangelical sympathies, been retained to lead Jeune in the various ecclesiastical charges made against Ritualists. Three times he had been sent as Commissioner of Assize, but he felt, and rightly, that these continual calls upon him deserved more permanent recompense.

The Lord Chancellor recognized that he had solid, even brilliant claims, and that he was eminently fitted for the Bench. Accordingly when Mr. Baron Cleasby retired, Stephen on 2nd January, 1879, was appointed a Judge of the High Court and assigned to the Exchequer Division.

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The distinctive appellation of "Baron" had been abandoned for all appointments after 1875, when the Judicature Act came into force, and Stephen therefore became Mr. Justice Stephen. Shortly afterwards, the three Common Law Divisions were amalgamated into the one Queen's (now King's) Bench Division. He did not abandon his legal writing. Judges have happily never been debarred from authorship. He had, after completing his work on the Criminal Code Commission, resumed his project of bringing out a new edition of the "General Review," but was not satisfied with its form, and rewrote it as a history which appeared in three volumes in 1883 as "A History of the Criminal Law." It was at once accorded the rank of an authority, and has never been superseded.

He next thought of writing upon a historical subject, and considered a plan to write the history of Warren Hastings' Trial. One may imagine what a labour that involved. The speeches alone fill four thick volumes apart from the oral evidence and the documents. He never did write that book, but as a preliminary he examined the charges made against Sir Elijah Impey, the Chief Justice of Calcutta in Hastings' time, whose name has been covered with infamy by the genius of Macaulay. Stephen had, when a baby, resolved not to be beguiled by Macaulay's goodness and wisdom, and he now set out to prove that the model was both inaccurate and unjust. Stephen's researches resulted in a book entitled "Nuncomar and Impey," published in 1885, which would clear Impey's reputation, if a tithe of those who read Macaulay would only read Stephen's refutation of his charges.

It was now that his energies received their first check. In April 1885 he fell ill and was absent for several months. Although on his return his judgments shewed little loss of power, his strength had been seriously tried, and he never was the same powerfully healthy man that he was before. He practically confined himself to his judicial duties, his

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only exception being in 1886, when he was Chairman of the Ordnance Commission.

The most celebrated case he tried was that of Florence Maybrick, who was convicted at the Liverpool Summer Assize in 1889 of the murder of her husband. Sir Charles Russell defended her with the utmost zeal and ability, but all his efforts were in vain. When she was arrested Mrs. Maybrick was condemned in advance, but in the meantime public opinion had turned in her favour, and the judge was received on leaving the Court by the groans and execrations of an excited mob.

But even if she were innocent (and many think she was) blame does not rest on Stephen, though his handling of the case was not satisfactory. He certainly summed up impartially enough, but he made many mistakes of detail, disquieting upon such an occasion and remarkable in a judge who before his illness had been noted for his exact memory for detail. His own comment on the case, made in the 1890 edition of his "General Review," is that it was the only one of the 28 he tried between 1885 and 1889, which were referred to the Home Secretary, in which there could be any doubt as to the facts, but he was careful not to say what his opinion was. Russell never ceased to exert all his influence in Mrs. Maybrick's favour. She was reprieved and after a long imprisonment was ultimately released. She died soon afterwards.

I once heard Sir Leslie Scott, formerly Solicitor General, say to the late Master of the Rolls Lord Sterndale (who was Russell's junior for the defence): "I never heard you express an opinion upon the guilt or innocence of Mrs. Maybrick." "I never did" was the dry reply. This was at a Liverpool dinner of the Northern Circuit.

By next year Stephen's powers had begun to fail. An illness in 1890 while on Assizes at Exeter left him unable to collect his thoughts without an obvious effort. In the following year he was again taken ill at Exeter, and, on

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learning that his conduct of cases was exciting adverse criticism, he consulted his medical advisers. Their advice was that he should retire. He faced the situation with courage and decision and resigned in April 1891. On his retirement he was made a baronet. His life was prolonged for three years, but he was a wreck of his former self, and he had the grief of losing his brilliant son, J. K. Stephen, who died in 1892. At last, on 11th March, 1894, Stephen himself died, survived by his wife, two sons and four daughters. Both these sons have attained eminence in the legal world. The elder, Sir Herbert Stephen, an old friend of mine, has for many years, in his capacity of Clerk of Assize of the Northern Circuit, been the universal and kindly adviser of the barristers going that circuit. His letters to *The Times* on legal matters command attention, and, as I have mentioned, he was a member of Lord Justice Atkin's Committee on Crime and Insanity. The younger son, Sir H. L. Stephen, was for many years a judge of the High Court of Calcutta, and has edited an interesting little edition of State Trials. A taste for legal authorship has run in the family. Mr. Serjeant Stephen, whose Commentaries are still read by articulated clerks, was a cousin of the judge. So too was the late Professor Dicey, whose works on constitutional law adorn legal authorship. Other relatives have attained distinction in writings of a different kind.

There is little to be said of Stephen as an advocate. He was neither pliable nor subtle, and would have scorned to be so even if he could, for he was impatient alike of affectation and of technicalities. As a man he was noted for the warmth of his friendship, for his boundless energy, and for his tremendous common sense. In his forensic career he shewed knowledge, care and precision. He satisfied his clients, but was never the idol of the public nor of solicitors. Still a man who could take silk after fourteen years and become a judge twenty-five years after call cannot be said to have failed as an advocate. He had a searching,

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accurate, lucid and logical brain. His outstanding merit gained him reputation in other ways, but it must be admitted that on his practice alone his promotion would hardly have been justified.

As a legal writer and as a draftsman of statutes declaring rules of law he has had few equals and no superiors. His secular writings are for the most part lost in the files of periodicals. They would repay reading both for their style and for his handling of the problems of his day. But the work of the journalist is necessarily ephemeral and as time passes it is forgotten. His legal writings can never be so neglected. Any lawyer might be proud if he produced one such work as the many Stephen wrote. His work as a draftsman has hardly borne fruit save in India. He was not a one-sided lawyer. He saw that the law is an organic whole and must be considered in relation to the life of the people. He pointed out that the criminal law, for example, reflected not only the changes of statute law, but also the development of the moral sentiments of the community. To understand criminal law thoroughly, as he did, it is essential to have a clear grasp of the principles governing all branches of law, since the temptation to commit crime may occur in all classes of life and in every branch of human activity. All the subject-matters of legal rules may come into question in the course of criminal trials. The close relation of the criminal law to constitutional principles is of course undeniable. As Stephen says, "Every great constitutional question has had its effect both on criminal procedure and on the definition of crime."

He had made himself a master of legal principles, and when he was called upon as a judge to deal with questions of contract and tort and administration he was adequately equipped. He was a safe and sound judge whose reputation has suffered undeservedly because of the last days when he was striving against physical infirmity to discharge his duty. Until his last illnesses he had established himself in the



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confidence of the public, though he made no jokes, and sought no opportunity to lecture litigants upon social questions, or to air his matchless erudition. One point was misunderstood. Because his hatred of brutality led him to visit crimes of violence with severe punishment he was thought to be a hard man, though it was in fact his sympathy with the victims of the criminals that produced his severity. The onlookers were appalled when at one Assize, in sentencing a man for stabbing, he told the felon that at the previous Assize a man had been convicted on precisely the same facts, save that his aim had been truer, and continued in his most impressive tones, "the sentence upon him was that he should be hanged by the neck till he was dead, and he was hanged by the neck until he was dead."

Stephen was not often called upon to make judicial pronouncements of fundamental importance. Indeed it can rarely happen that a modern judge of first instance with his many colleagues has to consider such cases. It was different in earlier days when a common law Court sat with all its judges to decide many points arising in the course of litigation. The modern counterpart, the Divisional Court, with its two or three judges, and shorn in favour of the Court of Appeal, or by simplification of procedure, of many of its former functions, gives less opportunity to gain the present-day prestige. Stephen did his work as it came. He was reversed on appeal, as indeed are all judges at some time or another, but his judgments are always learned, sometimes even profound, expositions of principle.

One of his earliest cases was *Alderson v. Maddison*, (1880, 5 Ex. D. 293). This was an action by a housekeeper against her employer's executors. She had served him for years without wages on a promise to leave her in his will a life estate in his farm if he were able to buy it. He did buy it, but when he died the promise had not been fulfilled by his will. Stephen held that she was entitled to sue,

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holding that the facts brought the case outside the provisions of the Statute of Frauds which require such a contract to be in writing. His judgment was reversed by the Court of Appeal and this reversal was upheld by the House of Lords. It is now the leading case upon the topic.

In the same year he was one of the Court of Crown Cases Reserved which considered *Regina v. Salmon*, (6 Q.B.D. 79). Three young men went to a field to practise rifle firing. Their mark was a board 100 yards away, but the rifle was effective to kill up to a mile. One of them, which it was impossible to say, fired a shot which killed a boy in a garden 330 yards away. There were roads and houses round the meadow. All were convicted of manslaughter and the conviction was upheld. Stephen's judgment was on these terms, "Manslaughter is unlawful homicide not amounting to murder. It is unlawful where caused by the culpable omission of a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of everyone who does any act, which without any precautions is or may be dangerous to human life, to employ those precautions in doing it. Firing a rifle under circumstances such as in the present case was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger."

*Att. Gen. v. Edison Telephone Co.*, (1880, 6 Q.B.D. 244), decided that a telephone was a telegraph within the meaning of the Telegraph Acts 1863 and 1869, though, at the time when those Acts were passed, the invention had never been thought of. In Stephen's opinion the word "telegraph" as defined was wide enough to cover every instrument that might be invented which employs electricity transmitted by a wire as a means of conveying information, and with a curious prevision he added that the words "transmitted

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by a wire " might be omitted. His masterly statement of the facts and examination of the statutes was convincing. No appeal was brought and the decision has been accepted, though inventions have since transformed the art of telegraphy.

*R. v. Marin*, (1881, 8 Q.B.D. 54), raised the question whether a practical joker could be convicted of crime. The prisoner moved by a perverted sense of humour placed an iron bar across the staircase forming one of the exits from a Leeds Theatre and then extinguished the lights at the head of the staircase. The result was a panic in which many people were injured. He was charged at Leeds Quarter Sessions with maliciously inflicting grievous bodily harm. The Recorder, after conviction, stated a case to the Court of Crown Cases Reserved. They upheld the conviction. As Stephen pointed out (p. 58) "a mere piece of foolish mischief is malicious. A man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another."

*R. v. Coney*, (1882, 8 Q.B.D. 534) is the leading case on aiding and abetting. The actual decision was that mere presence at a prize-fight is of itself not sufficient to render, as a matter of law, the bystander guilty of an assault as aiding and abetting the principals. Some more active participation is necessary.

Stephen's judgment is a valuable one which goes beyond the actual requirements of the point. He said (p. 549) "When one person is indicted for inflicting personal injury upon another the consent of the person who sustains the injury is no defence to the person who inflicts the injury if the injury is of such a nature or is inflicted under such circumstances that its infliction is injurious to the public as well as to the person injured." He then stated his reasons for holding that prize-fights are within the rule that in such cases consent is no defence, incidentally dealing with the mediæval tournaments, and continued, "In

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cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like." He was then led by the course of the argument to make some valuable observations on the powers of judges. He remarked (at p. 550). "A considerable part of the law of England consists of judicial decisions, and in the very nature of things this must be so. Every decision upon a debated point adds a little to the law by making that point certain for the future. . . . It seems to me that in exercising the narrowly qualified power of quasi legislation which the very nature of our position confers upon us, we ought to confine ourselves as far as possible . . . to applying well-known principles and analogies to new combinations of facts, and to supplying to general definitions or maxims and to general statutory expressions qualifications which, though not expressed, are in our opinion implied. I will illustrate my meaning. . . . I think the judges were acting within their powers when they decided that the offence of obtaining money by false pretences could be committed only by making a false pretence as to an existing fact, though this is not expressed by the statute which creates the offence. I think on the other hand that the Court would exceed its powers if it were to remove by judicial decisions the defects in the common law definition of theft which have caused so many failures of justice. To abolish a well-established rule of law because it is a bad rule is the business of the legislature." Since this decision the legislature has dealt with the illustrations Stephen gave and the law is now contained in the Larceny Act 1916, but they were exact in his day. After this discussion of general principles he concurred with the other judges in declining to hold that a looker on at a prize-fight must be convicted unless he proved a valid excuse. To hold such to be the law, he observed, was

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without support by legal analogies and would be an exception to all rules.

*R. v. Morley*, (1882, 8 Q.B.D. 571), was a decision by the Court of Crown Cases Reserved that a member of the "Peculiar People" was not guilty of manslaughter merely because, by reason of his religious belief, he did not call in a medical man to his sick child who died of the illness. Stephen pointed out that though the facts might have supported a conviction under another statute, it is necessary, in order to convict of manslaughter, to prove that the prisoner caused death or accelerated it. Years afterwards in *Rex v. Senior*, a conviction was upheld where evidence was given that such neglect had accelerated death. One at least of the groups of Peculiar People, who are for the most part highly respectable individuals in a humble class of life, now call in a medical man for all illnesses of their children under sixteen.

*Tillett v. Ward*, (10 Q.B.D. 17), turned on the liability of a cattle owner whose bull while being driven along a street ran into a shop and did considerable damage. Stephen held that he was not liable, observing, "When a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbours, but while he is driving them upon a highway he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing." He then pointed out that the latter principle had been applied to damage to property adjoining a highway, and therefore in the absence of negligence the owner of the bull escaped scot free.

In *Langrish v. Archer*, (10 Q.B.D. 44), Stephen held that playing the "three card trick" in a railway carriage was within the Vagrant Act Amendment Act, 1873, which made an offence of wagering or gaming in any open place to which the public have or are admitted to have access. He said that access obtained only by payment was never-

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theless access, and many tricksters since have learned to their cost that the judge's law was sound.

*R. v. Carr*, (10 Q.B.D. 76), raised an interesting point as to the Admiralty jurisdiction over crime. The prisoner was caught stealing on a British ship at Rotterdam. The ship was moored to the quay in the open river some sixteen miles from the sea but within the ebb and flow of the sea. There were no bridges between that place and the sea, and it was a spot where large vessels usually lay. The Court of Crown Cases Reserved upheld the conviction. Stephen said (at p. 86), "I see no reason founded on expediency or authority to induce us to say that a ship at anchor is within the jurisdiction and that a ship moored to the land is not, or to introduce intricacies as to the mode of attachment of the ship to the land or to enquire when the flag is lowered and when hoisted. Such rules would be to make law without meaning and to narrow a well-founded and beneficial jurisdiction."

*Strauss v. County Hotel Co.*, (1883, 12 Q.B.D. 27), is a well-known case on innkeepers' liability. A man went to the hotel meaning to spend the night, and with that intention gave his luggage to a porter. He was then handed a telegram which caused him to change his plans, and he went out, telling the porter to lock up the luggage. It was locked up, but when he returned to claim it a bag was missing. Stephen held that there was no evidence that the relation of landlord and guest existed, and this ruling was upheld on appeal.

*R. v. Manning*, (1883 12 Q.B.D. 241), is a decision that when two are indicted for conspiring with one another (and no one else) both must be convicted or acquitted.

*R. v. Price*, (1884, 12 Q.B.D. 247), is not a decision but a report of Stephen's charge to the Grand Jury of Cardiff Assizes. He directed them that burning a dead body instead of burying it is not a misdemeanour unless it be so done as to amount to a public nuisance, but, if an

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inquest ought to be held, that it was a misdemeanour to dispose of the body in any way so as to prevent the inquest being held. The prisoner had publicly burned the body of his dead child. Stephen went elaborately into the law and history of sepulture, and quoted Sir Thomas Browne's *Urn-Burial*. Though widely reported, his direction, probably because the prisoner was afterwards acquitted, was misunderstood. A man in Yorkshire burned his child's body privately and so prevented an inquest; he was convicted and the conviction was upheld by the Court of Crown Cases of which Stephen was a member (*R. v. Stephenson*, 1884, 13 Q.B.D. 331).

In the same year Stephen was called upon to decide a point of great constitutional interest. Mr. Bradlaugh claimed an injunction to restrain the Serjeant-at-Arms from executing an order contained in a resolution of the Commons excluding Bradlaugh from the House. The Court refused to intervene. Stephen delivered a learned judgment in which he examined the principles and decided cases. His views are indicated by these excerpts. In his opinion "The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its own internal proceedings." He pointed out that, even assuming that the Commons were wrong, the real analogy was that of an erroneous decision by a Court from which no appeal lies, and he concluded: "We ought not to try to make new laws under the pretence of declaring the existing law. . . . It seems to me that if we were to attempt to erect ourselves into a Court of Appeal from the House of Commons we should consult neither the public interest nor the interests of Parliament and the Constitution nor our own dignity." And he shewed that if the Courts claimed jurisdiction the natural result, owing to the system of appeal, would be to make the Lords the ultimate judges of the privileges of the Commons (*Bradlaugh v. Gossett*, 12 Q.B.D. 271).

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*Cundy v. Le Cocq*, (1884, 13 Q.B.D. 207), is a leading case of those offences where *mens rea* is not a necessary condition for conviction. Stephen ruled that the statute imposed an absolute prohibition against serving an intoxicated person with drink, and therefore it was no defence to prove that the publican did not know that the man was drunk.

*R. v. Haslehurst*, (13 Q.B.D. 253), decided that guardians were entitled to appoint and pay a Roman Catholic priest to minister to the inmates of their workhouses. Stephen confined himself strictly to the interpretation of an Order of the Local Government Board.

*Haines v. Guthrie*, (13 Q.B.D. 818), was a case where the admissibility of hearsay evidence in pedigree cases was in question. Grove, J., had admitted hearsay evidence to prove infancy in an action for the price of goods. Stephen and Mathew, JJ., reversed this ruling. Stephen examined the rule and the authorities bearing upon it, and held that it only applied in pedigree cases and not where such matters only came incidentally into issue. The Court of Appeal upheld the Divisional Court.

*R. v. Ashwell*, (1885, 16 Q.B.D. 190), is one of the leading cases on criminal law. Fourteen judges sat in the Court of Crown Cases Reserved and were equally divided, and the conviction therefore stood. A man named Keogh had been asked by Ashwell to lend him a shilling. Keogh handed him, as he thought, a shilling. It was in fact a sovereign. The jury found that Ashwell had accepted the coin as a shilling, though the evidence shewed that he knew and took advantage of the mistake shortly afterwards. The Court held that he was not a bailee and could not be convicted of larceny as a bailee. The division of opinion was whether it was larceny at common law. Stephen's reasoning that it was not seems conclusive, but apparently we must accept the decision as one that the taking did not occur until Ashwell realized the mistake. It was



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the law that an innocent taking followed by a subsequent misappropriation was not larceny at common law, as the same Court pointed out in *R. v. Flowers*, (1886, 16 Q.B.D. 643).

*Lyell v. Kennedy*, (1887, 18 Q.B.D. 796), decides that an agent cannot change his agency so as to hold adversely to the owner and thus acquire a title by prescription. Stephen so held, but the Court of Appeal reversed him. On appeal the House of Lords restored Stephen's judgment (14 App. Cas. 437). This important case has often been followed.

In *Colquhoun v. Brooks*, (1887, 19 Q.B.D. 400), Stephen made one of his rare pronouncements on tax law. He differed from Wills, J., but the Court of Appeal accepted Wills' view and so did the House of Lords. The case is the foundation of the principle of residence as rendering a person liable to tax on the profits of his trading abroad, and is constantly cited to the Revenue Judge. Though his opinion was not upheld, it at least had sufficient merit to secure the adherence of Fry, L.J., a clear proof that the point was one of great difficulty.

*R. v. Doherty*, (1887, 16 Cox C.C. 306), is constantly cited on Stephen's direction as to malice aforethought. He told the jury that the term merely implies an intention, which must necessarily precede the act intended, but does not involve premeditation. He went on to discuss how far drunkenness may be an excuse for crime. In his opinion "A drunken man may form an intention to kill another or he may not. If he did form that intention, though a drunken intention, he is as much guilty of murder as if he had been sober, but if his drunkenness prevented him from forming such an intention he would be guilty of manslaughter." The jury convicted of manslaughter. At the same Session of the Old Bailey, Stephen was called upon to discuss the old rule of "constructive murder." As the rule is stated : if a man in the course of committing

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a felony kills another it is murder. Stephen criticized this as being too loosely expressed. He thought it sufficient to limit the rule so that "any act done with intention to commit felony which causes death, amounts to murder," and thereby to exclude accidental cases where the death is obviously undesigned. The facts were horrible. The prisoner had a shop in the Strand. Financially he was in low water, and he had a son whose life was insured, so too was his stock in trade. There was a fire in which his son and another perished. The prosecution alleged that the prisoner had set fire to the building to defraud the insurance company, and argued that that circumstance made the prisoner a murderer. Stephen did not conceal his disbelief that the man would set fire to his house in order to kill his child, and the prosecution failed. (*R. v. Serné*, 16 Cox 311). The law remains in the same unsatisfactory condition.

*London Founders Association v. Clarke*, (1888, 20 Q.B.D. 576), is a Stock Exchange case. Stephen held that the transferor of shares does not impliedly warrant that the company will register the transfer, and consequently need not refund the price if the company, having power to refuse registration, exercise that power. This decision was upheld by the Court of Appeal.

*Taylor v. Timson* 20, (Q.B.D. 671), arose on the question whether reformatory boys were entitled to worship at the parish church. The plaintiff was one of the boys who went to church under orders and was ejected by a churchwarden. Apparently the fact that they were reformatory boys was the objection, but Jeune (Lord St. Helier) was too wary to raise such a point. Stephen held that the churchwarden committed an assault and awarded a shilling damages. But the decision was a victory for the managers of the school.

*R. v. Clarence*, (1888, 22 Q.B.D. 23), is another leading case. The Court of Crown Cases Reserved held by nine

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judges against four that a man was not guilty of assault when, by concealing from his wife that he had venereal disease, he communicated it to her. The prosecution relied on the maxim, "Fraud vitiates consent." Stephen, though loathing the man, was one of the majority and his reasoning is conclusive.

*Beresford Hope v. Sandhurst*, (1889, 23 Q.B.D. 79), was the celebrated case where Stephen held that a woman could not be elected to the London County Council. He was upheld on appeal. The subsequent legislature is too recent and too well known to require comment.

*R. v. Tolson*, (23 Q.B.D. 168), turned on the question whether there was any defence to bigamy where the prisoner had remarried within seven years of the other spouse's disappearance. In this case the woman had remarried within seven years but honestly on reasonable grounds believed that her husband was dead. He was in fact alive. In view of the conflicting decisions Stephen directed a conviction, but being of opinion that the defence was valid stated a case for the Court of Crown Cases Reserved. Nine judges against five held that the defence was valid. Stephen was in the majority. In the course of his judgment he discussed the meaning *mens rea*, and incidentally stated that he had been unable to trace the origin of the maxim *non est reus nisi mens sit rea*, which he denounced as being "too short and too antithetical to be of much practical value." His statement of the principle of *mens rea* is as follows : "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case the crime so defined is not committed."

*Gibbs v. Société des Metaux*, (1890, 25 Q.B.D. 399), decided that a contract made and to be performed in England is not discharged by bankruptcy or liquidation of a party in a foreign country where he is established, even

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when the foreign law declares such discharge to be a consequence. Stephen's judgment was affirmed by the Court of Appeal.

I now come to two decisions, the last of his that are reported, when he was suffering from the illness which caused his retirement. Neither shew any failure of mental powers. In *re Castioni*, (1891, 1 Q.B.D. 49), was an extradition case. Castioni had been actively engaged in an abortive rising at Bellinzona in the Canton of Ticino in 1890. A man was killed and there was evidence that Castioni had fired the shot. He was arrested in England and committed for extradition. On *habeas corpus* the question turned on "political crime." The prisoner relied upon Stephen's definition in the "History of Criminal Law" ii, pp. 70-71. The prosecution relied upon Mill. The judges preferred Stephen's version and discharged the prisoner. Stephen's judgment is one of sound reasoning, and contains the observations upon drafting statutes which are quoted earlier in this sketch.

*Hunt v. G.N.R.*, (1891, 1 Q.B.D. 189), was a case where a dismissed guard sued for libel. The defendants had in a monthly circular to employees stated the fact of the plaintiff's dismissal and gave the reasons. They claimed that the occasion was "privileged." Stephen agreed and was upheld by the Court of Appeal.

These decisions prove that Stephen was a man of an extremely judicial mind, of profound learning, and of great practical common sense. He justified his appointment, and the pity is that such a mind should, by reason of illness, have become clouded and the State thereby deprived of services which had proved always solid and sometimes brilliant. The one consolation is, that his retirement was followed by the appointment of Henn Collins (Lord Collins), whose judicial career as judge, Lord Justice and Master of the Rolls proved him to be a fit successor of the great master of the criminal law whose place he filled. But he,

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too, declined a little before the end—as no doubt we all shall.

The real truth is that Stephen should have been a Judge of Appeal. At first instance he was impatient, not quite at his ease, and by no means considerate in his treatment of counsel. Those who looked at him merely as a judge would not in his lifetime have placed him as high as I have done in this article.



THE RT. HON HARDINGE STANLEY, EARL OF HALSBURY  
LORD HIGH CHANCELLOR

*Photo Lafayette*



## THE EARL OF HALSBURY

IN December, 1921, there died two ancient men venerated by lawyers. Both of them had flourished in the days when law and equity were separate and apart, both had long adorned the judicial bench ; had retired full of years and honour. The first was Nathaniel, Lord Lindley, who died on the 9th of the month, a man of great learning and sound judgment, whose opinions are justly held in high esteem by those who practise the law. The other was Hardinge Stanley, Lord Halsbury, who died on the 11th, a figure less renowned for sheer learning, but whose reputation rests on far more than the admiration of the corporation of lawyers.

To the man in the street he was the embodiment of the Tory spirit—plain, blunt and masterful, averse to change—wise up to a point in counsel. By some strange fortune he has hitherto escaped the biographer, and few know of his simple piety, his warm affection and domestic simplicity. Few, too, have realized that a certain lack of subtlety discernible in his public utterances, judicial and political, was a drawback in counsel, and that the man so masterful upon the Bench was content in the private conferences where momentous decisions are taken to follow rather than to lead. What he seemed to be, he was. There were no secret mysteries in his life ; no unsuspected depths of learning or of guile. Few stories will reward the research of the curious. He was born a Tory, brought up and lived and died a Tory. He was, in fact (and this might almost suffice for his biography), a Victorian Eldon.

His simple but quick, lucid and efficient mind, equipped



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with adequate learning, led him through the successive stages by which the great advocate attains the Woolsack ; and, more, sustained him in the highest judicial office as the most eminent, in fact as well as in name, of the distinguished men who were his colleagues. He had not while at the Bar a reputation for learning ; he was classed as an advocate ; but the fact that for many years he held his own in the company of acknowledged masters of legal science proves that his grasp of legal principles was much more than that which enables an advocate to handle successfully such issues of law as require exposition in relation to fact and emotion, and, besides, poor advocates always call great advocates bad lawyers. It seems somehow to equalize things. Lord Halsbury, in virtue of whatever complex of qualities you may select will live in history as one of the famous Lords Chancellors.

Hardinge Stanley Giffard was born on 3rd September, 1823. His father was for many years the Editor of the *Standard*, now defunct, but at that time one of the most powerful supports of the Conservative Party. Though the child inherited his father's politics, he did not acquire therefrom any great belief in the Press ; indeed, his instinct was to distrust newspapers. His education was uneventful, both at school and at Merton College, Oxford. When he was called to the Bar in 1850 none could have been bold and discerning enough to predict his subsequent career. But his education had brought him an inestimable advantage—a sound knowledge of literature and the Classics, which he retained throughout his life. As a barrister he joined the Western, but soon migrated to the South Wales Circuit. During his early years he frequented the Hardwicke Society and similar institutions, where he debated the questions of the day with others of a like standing. His early work was mainly criminal and chiefly in London, where he practised at the Old Bailey and at Middlesex Sessions (the latter

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then including all London north of the Thames). Success in criminal cases in London has always brought a barrister's name before the public ; nor was his practice there impeded by his marriage to a daughter of Mr. Humphreys, a well-known solicitor practising in the criminal courts, whose grandson, Sir Travers Humphreys, now leads the Old Bailey Bar.

At this stage in his career he was noted for his grasp, quickness and vigour, and was in demand for defences. On Circuit naturally he progressed more slowly. He was, in his opinion, kept back there by Lord Campbell, a man of likes and even more of dislikes, who often went the South Wales Circuit and evinced a chronic disinclination to accept the young advocate's argument. This check must have been but momentary, but Giffard never forgot it.

The first case in which he proved that he was to be reckoned with in civil causes was *Ferret v. Hill*, (1854, 15 C.B. 207). It was an argument before Chief Justice Jervis and the other judges of the Court of Common Pleas. His client had no merits. He had obtained a lease by misstating the purpose for which he required the premises, and had at once turned them into a disorderly house. The indignant landlord, not unnaturally, had ejected his unlovely tenant, who brought an action at law against him. The landlord defended on the grounds that the lease was avoided at law by the false representation and the illegal use, and the argument was whether these availed him. The Court sympathized with the landlord, and when Giffard's leader rose he was soon snuffed out. Then Giffard followed, and the judges attempted to repeat the process, but they found that they had a different and a tougher man to deal with. He met their interruptions with argument, argument such as they could not withstand, and eventually he finished in peace. He had convinced a hostile Court. There could have been no appropriate covenant with a proviso for re-entry, and Giffard relied

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upon the fact that in an action at law none of the doctrines of equity were available. The judges were loud in their praises of his ability. A win in such circumstances naturally excited much professional comment and brought him many briefs. At the age of 94, when the writer of this work was Lord Chancellor, Lord Halsbury told him this story after a dinner at the Inn of Court of which he was Benchers and host. And he told too the story of an even earlier case relating to a pump. But the vicissitudes of this case were at once so fluctuating and so extraordinary, and its complications so conscientiously explained, that I cannot attempt its exposition with the cold accuracy aimed at in these pages.

The next few years Giffard spent in building up a practice in London and on Circuit which enabled him in 1865 to take silk. This step increased his work, for he early shewed that he could hold his own against the strongest leaders, and he soon was in great demand. Solicitors who felt that their clients' interests demanded a silk who could conduct a telling cross-examination and make a convincing speech, went first to Giffard, and in due course he was seen on one side or the other in all the *causes célèbres*. It is curious that with this reputation the legend should survive that he was only a criminal lawyer. True it was that he began in those Courts and was always in demand for such cases, but his criminal work, though of great importance, was not the main part of his practice. No competent critic at this time had any excuse for supposing Giffard to be anything but an extremely acute, accurate and versatile lawyer.

As a man of ambition he not unaturally stood for Parliament with noteworthy but quite explicable lack of success. This failure was a pecuniary advantage to him, and probably a much greater advantage to his Party than his success, since thereby he was left free to accept briefs on election petitions, an inferior form of advocacy in

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which he excelled. But with all this success he did not much increase his reputation as a lawyer, which is strange seeing that in 1867 he won a notable victory over Fitzjames Stephen, who applied to the justices at Market Drayton to commit Governor Eyre for trial. Giffard's argument for Eyre against a man so learned in the criminal laws outshone the technical High-brow's, and was recognized as a model both in form and in legal knowledge. Still it was in those cases where issues of fact are of the greatest importance that he chiefly appeared, and to discuss them would be to give an account of practically all the sensational cases of the day. The one that he himself thought the most noteworthy was *Belt v. Lawes*.

In 1875 he was made Solicitor General, though he was not and never had been in the House. This situation was then extremely unusual and elicited much comment, which turned to amusement when months passed by without his being able to find a seat. At length, in 1877, he was returned for Launceston, and this constituency remained faithful to him while he sat in the Commons. His career there was not too successful. Though he attracted attention by his readiness to attack Gladstone and by the vigour which he put into those attacks, he was too downright in speech, too convinced of his own view, and too dogmatic in his expression of it, to gain a great Parliamentary position. His short period of office did not interfere with his position at the Bar. Law Officers could then appear for private litigants. But he was so busy that juniors began to complain that he did not always read his briefs. It might have been so, but they could not complain of the way that he conducted the case. So he went on until 1885, when his Party again came into office. Giffard was the only surviving law officer among Lord Salisbury's followers, and a new Lord Chancellor was to be appointed. For some time the matter remained in doubt. It was whispered that Lord

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Salisbury favoured Sir William Baliol Brett (Lord Esher) who had been a judge for some years, and that Lord Randolph Churchill was supporting the claim of Giffard. Probably the determining factor was that the former Solicitor General could not be passed over without it appearing to be a slur upon him. He had held law office, he was the leading advocate of the day, and he was a loyal whole-hearted party man. I have been told by Mr. Saunders, who had intimate and inside knowledge, that Giffard demanded and obtained an interview with Lord Salisbury and by sheer persistency attained his purpose. Be that as it may, when the list of the new Cabinet appeared, Giffard figured as Lord Chancellor and was raised to the peerage as Baron Halsbury. Brett was consoled by a peerage.

The legal profession was not too hopeful. Giffard's reputation as a lawyer had been overshadowed by his great success as an advocate, but Lord Halsbury made good at once and conquered the confidence of the lawyers. His enormous common sense and view enabled him to go straight to the heart of the problem. The fact that an appeal involved difficult points of law never deterred him. When necessary, he showed that he was capable of exact detailed examination of the development of the rule under discussion. But his broad views and his tendency to view cases as issues of fact were not conducive to great pronouncements of legal principles, and the profession complained, and on occasion not without some grounds, that his judgments did not always give them the guidance they needed. It was not that he avoided the citation of authorities. Any conscientious plodder can cite cases ; some esteemed judges indeed present judgments which recall the admired text-books of the late Mr. Indermaur. Many illustrious judges, on the other hand, have not mentioned cases at all unless it was essential. But Giffard was apt in some cases, involving difficult and complicated problems, to

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seize upon that aspect of the facts which appealed to his mind, and thereby took a short cut to the result which seemed inevitable.

His utterances were always plain and directly to the point ; so that often he seemed to have scant regard to the feelings or doubts of the judges whose decisions were under review. This disregard was only the result of his directness ; he was never malicious, and his kindly nature would not permit him to inflict a deliberate injury. But the hammer of the cunning smith went straight to the centre of the anvil as he saw it ; and his eyesight was good.

No account of his judicial life would be complete without a mention of his clarity of language, which never left his meaning in any doubt, and of the confidence which he felt and showed in the opinions that he expressed. Nor was he apt to confine himself to appeals in matters of common law. He did not shirk the hearing of equity appeals or of those which involved Scottish or colonial laws, and his judgments in such cases are as authoritative as in others. Indeed, until extreme old age, he usually presided in the Privy Council when appeals involving constitutional questions arose, though he often left the task of delivering the opinion of the Board to one of his colleagues. His mind rejected any argument which offended against justice or honesty, and any advocate who, in his opinion, was setting up principles controverting constituted authority on the existing social order received short shrift. His mind had early received its impression, and he changed but little, so that many have very justly criticized him for being out of touch with the march of events. He is regarded as being an uncompromising opponent of reform, but he was a law officer when the Land Transfer Act was passed in 1875, and Lord Chancellor when its principles were made compulsory in 1897. Though one is often reminded that he defeated the Attorney General's scheme for legal education in regard to the

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funds of Clifford's Inn, it is not often that his critics recall that he favoured the Criminal Evidence Act, 1898, which enabled a person accused of crime to give evidence, or that it was in his third Chancellorship that Parliament made provision for the defence of poor prisoners at the public expense.

From 1885 he was Lord Chancellor three times. First in 1885, then for some years from 1886, and lastly, for ten years from 1895. Except Lord Eldon no modern Lord Chancellor has held office for so long, but the present practice whereby a former Lord Chancellor renders voluntary service gave him a judicial career which lasted over thirty years. In time the animosities of politics began to lose their contemporary sting. He lived long enough to overcome all petty jealousy, and was acclaimed by all as the worthy representative of British Justice. When, in 1920, the seventieth anniversary of his call to the Bar was celebrated by a solemn service at the Temple Church, the audience included not only the judges and lawyers, but men of eminence in all walks of life.

His private life was quiet and affectionate. By his first wife he had no children ; but his second marriage produced a son and a daughter in whose companionship he found great happiness. Towards the end his increasing deafness caused him to retire from social intercourse, though to a great age he manifested activity which would have been creditable to a much younger man. I was present on one occasion when as a man of over ninety he made an arrangement to play golf with his contemporary the Earl of Wemyss, which involved a long railway journey commencing at 8 in the morning, but he did not seem to regard the exertion as at all remarkable. The party was at Londonderry House in the day of the late Lord Londonderry. I remember that he played quite late, and paid his losses out of a queer old-fashioned leather purse which had circles of varying sizes to hold the different coins.

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The most criticized part of his career was that which relates to his judicial patronage. Several of his appointments were greeted with a storm of protest, not all of it well informed, but it must be admitted that in instances his good nature overbore his judgment. He seldom failed to discern the merits of members of his own family. "To whom will they be known if not to me?" one can hear his challenge. There is a story, probably quite untrue, that on one occasion he was asked to appoint a particular man to a vacant judgeship, but at first declined because the favoured person was not suitable. When, however, he was asked which was worse, to make that appointment or to see the head of an old family bankrupt, he gave way. Again, it is also said that he yielded once to the request of a Lord Justice to do something to remove a reporter who was deaf and incompetent, and accomplished the task by appointing the deaf man to a County Court judgeship. But no one who has had the anxious duty of appointing judges can fail to realize how difficult it is to estimate justly how an eminent barrister will develop as a judge. Some of the most promising appointments will prove to be disappointments; some from whom least was expected have shown marked ability. On the whole Lord Halsbury's appointments have worthily upheld (if they only just upheld) the dignity and traditions of the Bench. It is easy to be wise after the event, but some of his most criticized nominees lived to earn the confidence and respect both of litigants and of lawyers.

Lord Halsbury was not a legal writer, but he took great interest in those who did write. The great work which bears his name was, of course, not written by him. Nevertheless he read every page as it was passing through the press, and the work gained much from his criticism and advice. It is, however, by his judgments that he influenced the law.

Lord Halsbury's judicial career lasted thirty years. He



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first sat in the House of Lords in 1885, and continued to attend appeals both there and before the Judicial Committee until 1913, when he was 90. After that the infirmities of age rendered him unequal to the strain of attending to long argument though his intellect was unimpaired. He did, however, deliver a noteworthy judgment in 1916 on the principles to be applied to enemy controlled companies, the last reported case I have found which he attended.

It is too near his time to attempt to estimate his influence on legal development ; though he had a voice in nearly every important appeal to the Lords, the consequences of the decisions in many cases have not yet been fully worked out. The cases which I have selected for comment have been chosen rather to emphasize his directness, his lucidity, his faculty for plain unadorned language, and his inclination, if the occasion allowed, to solve a legal problem from his reading of the facts. When necessity arose, however, he proved himself well able to discuss the history of legal development and to handle cases like a master.

He knew the merits of past judges—for instance, in *Lloyd v. Grace Smith and Co.*, (1912, A.C. 716), he eulogized Sir John Holt as " the authority who for more than twenty years presided over the Court of King's Bench with the confidence of all parties at a somewhat stormy point of our history and who has been described as a perfect master of the common law." Occasionally, but not often, he praised counsel's arguments ; he was equally chary in his dispraise. He was content, as a rule, to wait until judgment to express his views on the case, and to leave the matter there. But once or twice he did unbend to poke decorous fun at counsel, as in *Seaton v. Burnand*, (1900, A.C. 135), where he said, " It is suggested now, indeed, that the verdict is against the evidence. Mr. Lawson Walton indeed went so far as to say that no

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reasonable jury could have found the verdict they did. I was sorry to hear him say so, because I should certainly have found the same verdict, and I am afraid the inference is unfavourable to me when I say that." In matters of construction of statutes, wills, conveyances or contracts, he rarely allowed himself to do more than insist that the Court should give effect to the "plain and natural meaning" of the words used and as to that meaning he seldom had a doubt; his judgments in such matters are hardly of value as guides, because he states the meaning to be given and is satisfied. Occasionally, however, he manifests impatience at the drafting of statutes. He had himself had experience in that art, and when he had to construe the Companies Act, 1900, he practically declined to express an opinion: "I have," he observed, "more than once had occasion to say that, in construing a statute, I believe the worst person to construe it is the person who was responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards, just because what was in his mind was what was intended, though, perhaps, it was not done. . . . I was largely responsible for the language in which the enactment was conveyed." (*Hilder v. Dexter*, 1902, A.C. 474.)

One of the earliest cases of importance that came before him was *Darley Main Colliery Co. v. Mitchell* (1886, 11 App. Cas. 127). The point raised was whether a landowner who has once recovered damages for subsidence can afterwards claim further damages for subsequent subsidences to the same land by reason of the same working that caused the earlier injury. Lord Halsbury said (at p. 132), "No one will think of disputing that for one cause of action you must recover all damages incident to it by law once

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and for ever . . . But the words 'cause of action' are somewhat ambiguously used in reasoning upon this subject ; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by damage I mean the damage which had in fact occurred ; and if this is all that a plaintiff can complain of, I do not see why he may not recover *toties quoties* whenever fresh damage is done . . . Since the decision in *Backhouse v. Bonomi*, (9 H.L.C. 503), it is clear that no action would lie for the excavation. It is not, therefore, a cause of action ; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered."

In *Metropolitan Railway v. Wright*, (1886, 11 App. Cas. 152), on the question of quashing a Jury's verdict. "If reasonable men might find . . . the verdict which has been found I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. . . . If their finding is absolutely unreasonable a Court may consider that shows that they have not really performed the judicial duty cast upon them, but the principle must be that the judgment upon the facts is to be the judgment of the jury, and not the judgment of any other tribunal."

*Wakelin v. L. & S.W. Railway*, (1886, 12 App. Cas. 41), was an action under Lord Campbell's Act where the only evidence was that the dead man's body was found on the line near a level crossing and that he had been killed by a passing train. Lord Halsbury in deciding that the widow had not proved negligence, summed up the situation thus : "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing ; but, assuming in the

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plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?"

In *Badische Anilin und Soda Fabrik v. Levinstein*, (1887, 12 App. Cas. 710), the unsuccessful argument is dismissed in these words: "The chief reliance was placed upon an argument as new as it is unsound . . . The argument may be stated thus: This thing is not new because things of the same sort in analogous chemical relations had been discovered; people ought to have discovered it or were on the brink of discovering it; therefore this true and first inventor only completed by one step the route to which chemical discoveries had been tending without his aid. Such a principle in Patent Law would be fatal to the rights of all inventors, and is, I believe, as inconsistent with that branch of our jurisprudence as it is destitute of judicial authority and contrary to the interests of scientific research."

In *Derry v. Peek*, (1889, 14 App. Cas. 337), Lord Halsbury would probably as a judge of first instance have found that fraud existed. The finding, however, was that the mis-statements were honestly made, and he accordingly agreed with Lord Herschell's judgment, saying, "The mere fact of the inaccuracy . . . ought not to be pressed into constituting a liability which appears to me not to exist according to the law of England." The liability of promoters of companies has been altered by statute, and they may now be liable for non-disclosure in the absence of fraud.

He was a great believer in *habeas corpus*, and in deciding that no appeal lay against the release of an applicant, he made these observations: "For a period extending as far back as our legal history, the writ of *habeas corpus* has been regarded as one of the most important safeguards of the liberty of the subject. . . . In the days of technical pleading no informality was allowed to prevent

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the substantial question of the right of the subject to his liberty being heard and determined. The right to an instant determination as to the lawfulness of an existing imprisonment, and the twofold quality of such a determination that, if favourable to liberty, it was without appeal, and if unfavourable, it might be renewed until each jurisdiction had in turn been exhausted, have from time to time been pointed out by judges as securing in a marked and exceptional manner the personal freedom of the subject. . . .

“It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries had been suddenly reversed, and that the right of personal liberty is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination of that question may only be arrived at by the last Court of Appeal.” (*Bell-Cox v. Hakes*, (1890, 15 App. Cas. 506 at p. 514).

This passage was cited with approval by the Lords who decided the recent case of *habeas corpus* applied for by Irishmen deported from England to Ireland. *Home Secretary v. O'Brien*, (1923, A.C. 603). The House refused to hear an appeal from the Court of Appeal which had granted the writ.

In *Bank of England v. Vagliano*, (1891, A.C. 107), Lord Halsbury expressed his view on the construction of a codifying statute (The Bills of Exchange Act). He said : “It seems to me that construing the statute by adding words to it, which are neither found there nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction ; and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created

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because before the existence of that code another law prevailed."

In *Musgrove v. Chun Teeong Choy*, (1891, A.C. 272), Lord Halsbury delivered the opinion of the Privy Council in an action where a Chinaman challenged the action of the authorities in preventing him from entering a British Colony. He said at p. 282 : "The facts . . . raise . . . a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance : but it is quite another thing to assert that an alien excluded from any part of Her Majesty's Dominions . . . can maintain an action and raise such questions as . . . whether the Crown has the right without parliamentary authority to exclude an alien."

In the same year he stated the principles upon which a mandamus will be granted against statutory bodies. He said : "The statute under which the Commissioners are acting is peremptory in its terms to the Commissioners to make the allowance to give the certificates in cases where they are commanded to be given. If, therefore, the case is made out that the facts show a case where the allowance ought to be made and the certificate, which is merely consequential, should be given, there is a plain duty imposed by the statute on these executive officers, the neglect of which is properly enforceable by mandamus." (*Special Commissioners v. Pensel*, (1891, A.C. 531 at p. 539).

In *Smith v. Baker*, (1891, A.C. 325), the great point was whether a man working near others whose operations endangered his safety was to be taken as having agreed to run the risk, when he went on working after pointing

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out the danger. It was held that he was not. Lord Halsbury pointed out that the question whether the servant had voluntarily undertaken the risk as a risk of his employment was one of fact and the operations of the others were clearly not a necessary risk of the particular employment, and added that to find against the servant the Court "must go to the length of saying that, whenever a person knows of a risk of injury to himself, he debars himself from any right of complaint if an injury should happen to him in doing anything which involves that risk. . . . Where it applies, it applies equally to a stranger as to anyone else, and, if applicable to the extent that is now insisted on, no person ever ought to have been awarded damages for being run over in London streets." The question in such case is whether the circumstances necessarily lead to the conclusion that the whole risk was voluntarily incurred by the workman.

In the same year he was party to the decision that in spite of an agreement to part with the child and leaving it to be brought up by others, a parent was nevertheless entitled to the custody when claimed. In this case Lord Halsbury said, (at p. 395): "The law has placed upon the mother of an illegitimate child obligations which ought to, and in my opinion do, bring with them corresponding rights." (*Barnardo v. McHugh*, (1891, A.C. 388). The law has since been modified by statute. In *McLeod v. Att. Gen.*, (1891, A.C. 455), he delivered the judgment of the Privy Council that the territorial limits of the jurisdiction and authority of a Colony prevented bigamy committed in the United States from being tried or made triable in New South Wales.

During 1893, Lord Halsbury delivered a learned judgment to the effect that the abolition of local venue had not enlarged the jurisdiction of the Courts. Therefore it was held that a tort committed to land abroad could not be made the subject of an action here, not having

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been so triable before them (*British South Africa Co. v. Companhia de Moçambique*, (1893, A.C. 602). In the following year he was sitting when the Lords decided that the principle that there was no right of contribution between joint wrong-doers should not be extended. After pointing out that it was too late to question the principle, he expressed his approval of it within its proper sphere, observing (at p. 333), "The word 'tort' in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But 'tort' in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong"—in other words, in cases of pure tort, to imply a right to contribution would go all the length of implying a conspiracy, in itself a tort and an unlawful agreement. (*Palmer v. Wick, S. S. Co.* (1894) A.C. 518).

In the following year the Lords laid it down that a lawful act cannot be made unlawful by a mere allegation that it is done maliciously. Lord Halsbury put it thus: "The only remaining point is the question of fact alleged . . . that the acts . . . are done, not with any view which deals with the use of his own land or the percolating water through it, but is done . . . 'maliciously' . . . It comes to an allegation that the defendant did maliciously something that he had a right to do. . . . This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question . . . appear to me to be absolutely irrelevant." (*Bradford Corporation v. Pickles*, (1895) A.C. 587).

The modern extension of the law of companies has led



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to the "one man company." The lawfulness of such a company was upheld in *Salomon v. Salomon*, (1897, A.C. 22). Lord Halsbury had no doubt. He said: "The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company, and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there." In *Boulter v. Kent Justices*, (1897, A.C. 556), it was determined that licensing justices, when acting as such, are not a court of summary jurisdiction. Lord Halsbury in analysing the statutes, remarked: "I do not think they are a Court at all. The whole licensing system has been conducted under a code of its own. . . . It is true that justices are selected as the persons who are to exercise the jurisdiction . . . in the whole course of legislation, the distinction between a court and something which is not a court has been preserved."

In this year the trade union movement had raised in the Lords, in *Allen v. Flood*, (1898, A.C. 1), an important question as to the rights and liabilities of trade unionists and their representatives. The question arose in this way. Certain shipwrights were engaged in repairing the woodwork on a ship and certain ironworkers were working on the ironwork. On a previous job the shipwrights had worked on the iron, a practice which the ironworkers'

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union condemned. When this was found out, the ironworkers became restive, and the appellant, a delegate of the union, was sent for, and ultimately he informed the repairing firm that unless the shipwrights were discharged the ironworkers would knock off and would be called out (it was not clear which form of words he used). As this would have caused a stoppage, the firm discharged the shipwrights. The terms of their employment were that they could be stood off at any time. The discharged men sued the delegate for maliciously procuring their discharge. The action was successful and the judgment was upheld by the Court of Appeal. So important was the case considered that the Judges were asked to attend the Lords and give their opinions. Six (Hawkins, Cave, North, Wills, Grantham and J. C. Lawrance, JJ.) were for the plaintiffs, and two (Mathew and Wright JJ.) for the defendant (appellant). The Lords decided in favour of the appellant by six to three (Lords Watson, Herschell, Macnaghten, Shand, Davey and James of Hereford against Lords Halsbury, Ashbourne and Morris). Lord Halsbury's judgment was therefore a dissentient one. What is valuable about it is the light that it throws upon his political ideas—that is, in the real meaning of the word without regard to party allegiance. Among his observations on the case he declared : “ The right to employ their labour as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong. Very early authorities in the law have recognized the right, and in my view no authority can be found which questions or qualifies it . . . the preliminary question, viz., whether there was any right in the plaintiffs to pursue their calling unmolested must be answered in the affirmative. . . . It is, indeed, part of that freedom from restraint, that liberty of action, which in my view may be found running through the principles of our law. . . .

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It is said that an action for the infringement of such a right is a novelty ; but I do not concur that it is, or that, if it were, it would be a sufficient answer. The whole history of the action on the case from 13 Edw. I c 24 downwards affirms the principle that where cases fall under the same right and require a like remedy, new precedents should be created. . . .”

Then on the use made of *Bradford v. Pickles* he answered, “ The objection made . . . appears to be that the word ‘ malicious ’ adds nothing ; that if the thing were lawful it was lawful absolutely ; if it was not lawful it was unlawful—the addition of the word ‘ malicious ’ can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances. The word ‘ malicious ’ appears to me to negative just cause or excuse. . . .”

Again on Allen’s acting on its own initiative without authority,—“ If concerted action to enforce . . . the will of a large number of men upon a minority . . . be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters and so produces the injury . . . could shield himself . . . by proving that the body . . . had given him no authority for his threats ; so that, if they in truth authorized him, he and they might all have been responsible ; while the false statement that he made, though acting upon the employer by the same pressure because it was believed, and producing the same mischief . . . could establish no cause of action against him, because it was false,” and finally, while regretting the difference of opinion, he concluded, “ My difference is founded on the belief that in denying these

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plaintiffs a remedy we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all." It is convenient to anticipate a little by citing *Quinn v. Leathem*, (1901, A.C. 495). In the latter case the allegation was not against an individual but that several had combined together to injure a man in his trade by inducing others to break contracts with him and to abstain from dealing with him or entering his service. It is the law that in certain circumstances a person acting alone may be free from liability when if several combine together to do the same they will be liable in damages. In the latter case *Allen v. Flood* was discussed at great length. Lord Halsbury would not admit that it affected the case at all. "A case," he said, "is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." In his opinion, "if, upon these facts so found, the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community." In this case the Lords agreed with him. These two cases are still authorities upon the general law, but in the special disputes classed as "Trades disputes" special legislative exceptions have been made, upon the propriety of which this is not the place to express an opinion.

In *Brown v. Att. Gen. for New Zealand*, (1898, A.C. 234), the Privy Council by Lord Halsbury's mouth restated that principle of law which moved Bumble to pronounce the law to be "a ass." He said, "The jury found . . . that the prisoner was married to the other defendant, and that she acted under his control. For the latter proposition there is not a scintilla of evidence, and no such question should have been left to the jury.

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The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time if the wife was voluntarily a party to the commission of a crime her coverture formed no defence," and he cited a long passage from Bracton iii c. 32. "Questions have from time to time arisen how far the mere presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform. But . . . here even that question does not arise. The acts attributed to the prisoner were acts done by herself in the absence of her husband conclusively establishing that she was voluntarily acting and aiding and assisting in arrangements leading up to and intended to assist the commission of the offence which was afterwards consummated." This pronouncement, which would have consoled Bumble, came too late to prevent his celebrated criticism of the law.

*Powell v. Kempton Park Race Course Co.*, (1899, A.C. 143), is supposed to decide that a racecourse is not a "place" within the Betting Acts. After analysing the section, Lord Halsbury said, "The thing against which the enactment is levelled is any place used in the sense I have explained. There must be a business conducted, and there must be an owner, occupier, manager or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper or occupier, who bets or is willing to bet with the persons who resort to his house, room or other place. In this view it is not an offence under this Act of Parliament to allow persons to assemble for the purpose of betting with each other. There is, upon this hypothesis, no business being conducted at all. . . . There is no betting establishment at all, and there is no keeper of one. I do not think, therefore, that the important question is : what is a place. I think

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. . . that any place which is sufficiently definite and in which a betting establishment might be conducted would satisfy the words of the statute."

In *Ruabon S.S. Co. v. London Assurance*, (1900, A.C. 6), a vessel had to be dry-docked at the underwriters' expense, and the owners not unnaturally took advantage of the circumstance to do things to the vessel. It was suggested that this involved them in the obligation to share the expense of docking, but the Lords said, No. Lord Halsbury at p. 10 put the matter quite definitely: "The Courts will no doubt enforce the common law and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that, when one person gets some advantage from the act of another, a right of contribution arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law except such a general proposition as I have indicated above. Now I am unable to affirm that it is the condition of the common law," and he proceeded to show why.

In *The Mediana*, (1900, A.C. 113), Lord Halsbury was called upon to decide upon measure of damage and went a little beyond the actual needs of the case. He said (at p. 116), "How is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But

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nevertheless the law recognizes that as a topic upon which damages may be given."

The first Workmen's Compensation Act was designed to prevent the lawyers having much say in disputes, and it is said that the late Mr. Chamberlain took a great deal of pains in drafting it himself so that it should be simple and plain. When the Act came into operation, however, the questions that arose as to the meaning were so numerous as to threaten to swamp the Courts with litigation and the Act had to be redrafted and re-enacted. It was with regard to the earliest Act that Lord Halsbury remarked, in *Powell v. Main Colliery Co.*, (1900, A.C. 366, at p. 371), "It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror in the mind of a lawyer, namely, that there should not be any lawyers employed at all."

In *Cooke v. Chas. A. Vogeler Co.*, (1901, A.C. 102), Lord Halsbury made some valuable remarks upon the extra-territorial operation of English legislation. "English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner, coming to this country and trading here and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case, while he is here, while he is trading, even if not actually domiciled, he is liable to be made a bankrupt like a native citizen. And so an Englishman, by reason of his nationality, is subject to the laws of his sovereign wherever he may be. But the territoriality, so to speak, of the bankruptcy laws is by necessary inference imported into . . . the Acts . . . by the generality of its phrases. The words, 'debtor' and 'creditor' certainly cannot be sufficient to give jurisdiction to the English Court of Bankruptcy, because, if unlimited, they would give jurisdiction over all the world

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in respect of debts and petitions or acts of bankruptcy committed anywhere, and it is a familiar maxim of the law : *Extra territorium jus dicenti non impune paretur.*"

In another celebrated trade union case Lord Halsbury scouted the idea that a trade union could not be made liable in tort. "If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement." (*Taff Vale Railway v. A.S.R.S.*, (1901, A.C. 426, at p. 436.)

In several cases he had occasion to express his views upon the nature of martial law. In *ex parte Marais* (1902, A.C. 109), he delivered the opinion of the Judicial Committee, in the course of which he remarked : "Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals. . . . War . . . was actually raging. Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging," and he cited *Elphinstone v. Bedreechund*, (1830, 1 Knapp P.C. 316), and continued : "It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity and whether the intervention of the military force was necessary, but once let the fact of war be established, and there is a universal consensus of opinion that the civil courts have no jurisdiction to call into question the propriety of the action of military authorities. The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." Again in *Janson v.*



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*Driefontein Mines*, (1902, A.C. 484), the question arose whether an insurance against seizure made by a Transvaal Company with an English Insurance Company was valid where the seizure was made by the Transvaal in contemplation of the war which followed. The Lords held that it was. Lord Halsbury remarked (at p. 491), "I do not think that the phrase 'against public policy' is one which in a Court of Law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. . . . I deny that any Court can invent a new head of public policy. . . . It is inevitable that the particular case must be decided by a judge : he must find the facts, and he must decide whether the facts so found do or do not come within . . . the principle of public policy, recognized by the law, which the suggested contract is infringing or is supposed to infringe. . . . No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended, but the rights on the contract are unaffected, and, when the war is over, the remedy in the Courts of either is restored. . . . It would be to my mind to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war, and war alone, that makes trading illegal." The decisions during the late war have shown that the statement of the effect of war upon contracts is made somewhat too widely, but the substance is right. Again, in *Tilono v. Att. Gen. of Natal*, (1907, A.C. 93), as the mouthpiece of the Judicial Committee, Lord Halsbury said : "The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous from time to time to authorize what are called 'Courts' to administer punish-

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ments and to restrain by acts of repression the violence that is committed in time of war instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things, alleged to have been done, are proved. But to attempt to make these proceedings of so-called 'courts martial,' administering summary justice under the supervision of a military commander, analogous to the regular proceedings of courts of justice, is quite illusory." In *Ander- sen v. Murten*, (1908, A.C. 334), an attempt was made to recover upon a policy of marine insurance "warranted free from capture" where the ship was seized as prize by the Japanese Navy but was wrecked on the way to port for adjudication. She was subsequently condemned for unneutral conduct. Lord Halsbury poured contempt on the argument that the underwriters were liable. "Where, as in this case, possession was taken by the hostile force and an adjudication of condemnation as prize by the proper Court followed on grounds recognized by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture." Unfortunately, the infirmities of age deprived the country of his assistance in the legal problems which arose during the war, but in one case he did emerge from his retirement. He was one of the Lords who decided in *Daimler Co. v. Continental Tyre Co.*, (1916, 2 A.C. 307), that an enemy controlled company, though registered in England and subject to English law, could not enforce its contracts during the war. Lord Halsbury said (at p. 316), "The limited liability was a very useful introduction into our system, and there was no reason why foreigners should not, while dealing honestly with us, partake of the benefit of that institution; but it seems to me too monstrous to suppose that for an unlawful (because, after the declara-

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tion of war, a hostile) purpose the forms of that institution should be used and enemies of the state while actually at war with us should be allowed to continue trading and actually to sue for their profits of trade in any English Court of Justice."

I have anticipated some decisions in order to group the war points together. There are still others that demand citation. In *Leigh v. Taylor*, (1902, A.C. 157), the question was whether certain tapestries had become fixtures in the sense that they had become part of the house. In Lord Halsbury's opinion they had not. He said: "My own view is that going back for some centuries, the real differences of opinion, which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. 'The principle appears to me to be the same to-day as it was in the early times, and the broad principle is: that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir.'"

In the same year he made an observation as to the position of the Attorney General as guardian of the rights of the public. He said, "In a case where as a part of his public duty he has a right to intervene, that which the Court can decide is whether there is the excess of power which he, the Attorney General, alleges. Those are the functions of the Court; but the initiation of the litigation and the determination of the question whether it is a proper case for the Attorney General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country

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has made to reside exclusively in the Attorney General.” *London County Council v. Attorney General*, (1902, A.C. 165).

The efforts of the Sultan of Muscat to suppress gun-running in the Persian Gulf led to trouble which came before the Lords in *Carr v. Francis Times & Co.*, (1902, A.C. 176), the owners challenging the legality of the seizure. Lord Halsbury pointed out the difficulty in their way. “The argument comes to this—that the Sultan of Muscat is not entitled within his own territory to say what shall or shall not be the subject of traffic. He has said he prohibits a particular class of traffic passing through his territory. . . . It is said, forsooth, that an English jury can go behind that declaration of the Sultan and say, ‘Well, but you ought not to have done so, because, in fact, these arms were not going where you supposed they were.’ What has that got to do with it? Are we going to administer the laws of Muscat and determine whether or not the Sultan was right in what he did? The Sultan’s authority is supreme, and what he says is law, is law for the purpose of governing all acts which take place within his territory.”

A difficult question which arose where a clerk authorized to issue delivery orders issued them to himself under an assumed name and in that name sold the goods to an innocent third party offered no sort of trouble to him. “I think,” said Lord Halsbury, “it might be stated compendiously in two senses. A servant has stolen his master’s goods, and the question arises whether the parties who have received those goods innocently can set up a title against the master.” But though he was so certain it was stealing (as indeed it was in the popular sense), he probably would have felt more hesitation were he in the position of counsel who had to maintain that the facts did make the transaction an actual larceny. *Farquharson v. King*, (1902, A.C. at p. 329).

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In *Gardner v. Hodgson's Kingston Brewery*, (1903, A.C. 229), the question arose as to the effect of evidence that a way had been used for over twenty years and the firm making use of the way had paid the owner of the land 15s. a year. The Lord Chancellor had no doubt that it was conclusive against a right of way. He said (at p. 231): "One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed. Those who drafted the Prescription Act knew well what they were about when, in dealing with the consequences which have to follow from long continued user, they used the words 'as of right.' . . . If this was a permission paid for it was not the less a permission, and a permission to use a way cannot establish a right."

In the *Poulett Peerage Case*, (1903, A.C. 395), he expressed strong views as to the presumption of access. "There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there was intercourse and that you could not possibly contradict it. I think that idea is completely exploded.

"The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife . . . as regards the rule, which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be enquired into in any Court of Law, it would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events and to prove that he had not induced the woman

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whom he was afterwards to make his wife to be guilty of the sin of fornication. . . . I should lament for the reputation of English law that it should be supposed that our jurisprudence sanctioned such an outrage upon reason and common sense as to reject such evidence." The result of the case was to reject the organ-grinder's claim.

In 1904 Lord Halsbury was called upon to decide a difficult and important question as to church property in Scotland. In 1900 two religious bodies, the Free Church of Scotland and the United Presbyterians, agreed to unite. There were a number of dissentients, and they claimed that the trust property remained in them and could not be used for the purposes of the united body. The Lords called for a second argument. Ultimately the dissentients, who were nicknamed the "Wee Frees," won, and the subsequent settlement was facilitated by statute. Lord Halsbury summed up his opinion in these words: "There is nothing in calling an associated body a church which exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another. Any other view, it appears to me, would be fatal to the existence of every Nonconformist body throughout the country." *General Assembly v. Lord Overton*, (1904, A.C. 515 at p. 627).

In the same year a most important decision was pronounced on the measure of the right of "ancient lights." Lord Halsbury's view, which prevailed, was that the holder of that right could only complain where there was a substantial interference with the light enjoyed. "After an enjoyment of light for twenty years . . . would the owner of a tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever? . . . If that were the law, it would be very far reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow and would formidably

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restrict the rights of people to use their own land. . . . The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise, as if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action ; but in each of such cases it becomes a question of degree, and the question in each case is whether it amounts to a nuisance." *Colls v. Home & Colonial Stores*, (1904, A.C. 179, at p. 182).

In *Watson v. McEwan*, (1905, A.C. 480), the question arose whether a witness enjoyed the same immunity for the information he gave to the solicitor as he did when giving evidence. 'The Lords had no difficulty in holding that he did. "If this could be done," said Lord Halsbury, "the object for which the privilege exists is gone. . . . The hardship is not to be compared with that which would arise if it were impossible to administer justice because people would be afraid to give their testimony."

In the *Earldom of Norfolk Case*, (1907, A.C. 11), Lord Halsbury as a member of the Committee again affirmed the principle that a peer could not surrender his peerage, and this ruling proved fatal to the claim.

In 1908 he was called upon to construe a commercial document, and made pungent criticisms upon the drafting. "Lord Blackburn used to say that the contest between commercial men and lawyers was that the commercial men always wished to write it short and the lawyers always wished to write it long ; but a mixture of the two renders the whole thing unintelligible. . . . The known con-

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dition of the law is that, unless protected by protective clauses, the defendant is liable ; he has only put together, or jumbled together, a number of phrases to which no legal interpretation can be given, and the result is that the state of liability under the law remains what it was and the defendant is liable." *Nelson Line v. James Nelson & Sons*, 1908, A.C. 16 at p. 20).

In 1911 he was concerned in the hearing of an appeal as to public right of fishing in Lough Neagh. "I must for my part," he remarked, "deprecate any effort to make the law yield to a popular claim which does not and cannot exist at law because one sympathizes very much with a large class of poor people who are supposed to obtain their living by the exercise of the practice of fishing in an area over which they have no legal right to claim the rightfulness of their practice. There is an old gibe on the subject which suggests that hard cases make bad law."

In *Leach v. The King*, (1912, A.C. 305), Lord Halsbury scouted the idea that a wife could be compelled to give evidence against her husband. "If you want to alter the law which has lasted for centuries and which is almost ingrained on the English constitution in the sense that everybody would say, 'To call a wife against her husband is a thing that cannot be heard of'—to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it seems to me to be perfectly monstrous." He had little sympathy with those who deny the title of man and wife to persons who are married according to the law of the land but who according to some ideas ought not to be able to marry. He said, "I think everybody now would understand what was the meaning of 'persons of notorious evil life,' and to say that that language is appropriate to those persons who are legally married and whose marriage is absolutely established by Act of Parliament would, as it seems to me, if it were not so serious a matter, be



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absolutely ludicrous." *Thompson v. Dibdin*, (1912, A.C. 533). Nor was he inclined to submit his opinions to the test of popular ideas. He said in *Costello v. s.s. "Pigeon,"* (1913, A.C. 407), "I am not much impressed by the question : what the man in the street would say." The last case of importance, apart from the *Daimler Case*, to which I have already referred, which Lord Halsbury took part in was *Scott v. Scott*, (1913, A.C. 417), where the House of Lords held that divorce cases could not be heard in camera, however painful the details. He agreed with the decision, remarking that the general rule is : "Every Court of Justice is open to every subject of the King." He was anxious to make it clear that his general assent to the opinion expressed by the Lord Chancellor should not be construed into assenting to any exception, saying : "I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it . . . but I should require to have brought before me the concrete case before I expressed an opinion upon it."

These notes though lengthy do not represent more than a fraction of the judicial pronouncements made by Lord Halsbury. Many may miss cases to which they attach importance, but my object has not been to make a critical examination of his judgments. I have endeavoured to illustrate his mind and methods, and in doing so to recall the memory of a very great figure in the recent history of our realm.

But while I have recognized in him a master of the Common Law, he will not live alone by this. He will be remembered more for his stubborn and unconquerable pertinacity of view alike in the legal and political fields. I do not recall that he ever admitted that he had been wrong in either. Nor do I believe that he ever thought so. I remember an occasion when he attended a meeting of

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the shadow Cabinet to consider certain proposals put forward by Lord Lansdowne for the reform of the House of Lords. He listened closely for two hours (as he often did) without saying one word; and at last rose with the observation: "I must leave now, but before I go make it plain that I disagree with every suggestion that has been made."

He was as tenacious of life as of his principles : so that he will be remembered too as the old man, vital and vernal, who stripped the chaplet of longevity from the brows of Eldon, of Brougham and of Lyndhurst.